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CLERK

In the Supreme Court of the United States

October Term 1986

No. ____________

ROBERT ALEXANDER,

Petitioner

-v-

CITY OF MENLO PARK,
MIKE BEDWELL,
Manager of City
of Menlo Park,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ROBERT ALEXANDER
2785 Hunter Street
E. Palo Alto, CA
(415) 326-4527

Petitioner In Propria
Persona

129pp

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ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF OF PETITIONER

ROBERT ALEXANDER
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Persona

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding in a Title VII and 42 U.S.C. 1981 and 1983 case that a government employer has conducted personnel practices free of racial bias and discriminatory intent when the employee has proven a due process violation by the employer of violating its own rules?

2. Whether the Court of Appeals erred in limiting its finding of a due process violation to the denial of bumping rights in that the governmental employer's termination of plaintiff from his employment in toto without cause, without a hearing, without an opportunity to defend himself against charges, and in a manner which violated numerous other personnel rules it was obligated to follow, constituted, as a matter of law, additional violations of due process rights.

3.. Whether an employee can prove retaliation and/or race discrimination under Title VII and/or 42 U.S.C. Section 1981 when an employer admits it was aware than an employee

had employee rights, but refused to offer them for alleged fear that the employee would be insulted and demeaned by such offer.

4. Whether the Court of Appeals erred by affirming the District Court's rejection of plaintiff's 42 U.S.C. Section 1981 Cause of Action when the District Court failed to discuss the chain of proof or any other basis for its decision pertaining to said cause of action.

5. Whether the Court of Appeals' rejection of the Title VII and 1981 claims of racial discrimination was based on an improper standard of proof, i.e., the trial court's finding regarding the employer's favorable treatment of another Black employee, a standard at direct odds with the Supreme Court's decision in <u>Connecticut v. Teal</u>, 102 S.Ct. 2525 (1982).

6. Whether the Court of Appeals erred in its determination of what was the proper legal standard and burden of proof applicable under Title VII and 42 U.S.C. Section 1981 and

Section 1983 in establishing a prima facie case of retaliation.

(i) In this regard, did the trial court's failure to use the correct chain of proof prejudice the evidence and not afford the plaintiff due process?

7. What constitutes a causal link in making out a prima facie case determination in a retaliation case under Title VII and 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983, and does this case do so?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

Petitioner, Robert Alexander, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on April 24, 1986, with rehearing denied on June 24, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is for publication, and is cited as 787 F.2d 1371. The opinion along

with the Order overruling Petitioner's Petition for Rehearing and the judgment of the District Court are attached as Appendices hereto.

JURISDICTION

The opinion of the Court of Appeals was entered April 24, 1986. A timely petition for rehearing was denied on June 24, 1986. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutes involved are 42 U.S.C. Section 1981, 42 U.S.C. Section 1983, and 42 U.S.C. 2000e et seq.

STATEMENT OF THE CASE

The plaintiff, ROBERT ALEXANDER, stated three causes of action against the defendant, CITY OF MENLO PARK, by reason of the termination of his employment by the CITY OF MENLO PARK on August 5, 1979.

The First Cause of Action alleged equal protection and due process irregularities and violations of 42 U.S.C. Section 1983. The Second Cause of Action alleged (a) racial

discrimination pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e, et seq.), in evaluation, discharge, and other terms and conditions of employment in violation of Section 703 of Title VII, and (b) retaliation against plaintiff for imposing unlawful employment practices in violation of Section 704(a) of Title VII. The Third Cause of Action alleged racial discrimination in violation of 42 U.S.C., Section 1981.

The plaintiff sued for monetary damages as well as other affirmative relief and requested that the Court reinstate him in his employment with the CITY OF MENLO PARK and provide back pay and other benefits with interest.

Plaintiff is a Black male citizen of the United States. He is a veteran of the armed services, and holds a master's degree from San Francisco State University.

On November 11, 1974, plaintiff started working with defendant City of Menlo Park as Youth Services Facility Director.

The job description at the time defined the position as "[u]nder direction of the Community Facilities Director/Administrative Assistant, to manage the operation of a community based facility, located in a predominantly black neighborhood, wherein youth oriented activities are planned, conducted, and evaluated." Job duties included job counseling, job placement, preparing youth for jobs, and recreation activities. (Tr. Ex. 5, Excerpts, pp. 126-128). Plaintiff's full-time staff reporting to him at one point in time was four people. Additionally, part-time people were under his supervision. (RT 18:21-19:2). There was a lot of community and civic contact work, and a large budget to prepare and administer. Plaintiff was successful in obtaining a large grant to help fund the program. (RT 19:3-20:21; 33:20-35:10; 538:4-7; Excerpts, pp. 126-128).

During the course of his work, plaintiff was required to come into, and stay in, contact with business leaders, civic

groups, the city council, drop-outs, and unemployed youth, and was highly successful in placing many unemployed young people into private sector employment. (TR. Ex. 8, Excerpts, p. 131).

Plaintiff received highly favorable evaluations and feedback during his tenure as Youth Services Facility Director. (See Tr. Ex. 6, 7, 8, 9, and 51, Excerpts, pp. 129-137, 171).

The Youth Services Facility program was a political issue for a considerable period of time. (RT 35:2-4). In addition to expending his efforts on the Youth Services Facility program, plaintiff was constantly pushing for stronger affirmative action programs and commitments by the City of Menlo Park as a whole, finding himself at odds with Mary Leydon, a Caucasian, who was responsible for developing the affirmative action goals and programs in 1978. Plaintiff indicated that after he had publicly opposed Mary Leydon's affirmative action proposal there was a

noticeable cooling in their relationship. (RT 3214:14-215:23; 396:24-398:8; 456:23-459:5). Starting in or about 1978, there were large cutbacks in the funding of the Youth Services Facility program. (RT 356:22-357:21). At that time, there was a reorganization, and plaintiff was placed under the supervision of Mary Leydon, where he continued to hold the position of Youth Services Facility Director.

On or about January 15, 1979, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission against defendant City of Menlo Park, which complaint was especially aimed at the City's promotion practices and system of announcing job openings. (Plaintiff's Trial Exhibit 2).

On or about January 23, 1979, allegedly for budgetary reasons, the City Council voted to abolish plaintiff's position of Youth Services Facility Director.

On or about January 24, 1979, plaintiff received a letter from Mike Bedwell, City Manager, notifying him that the City

Council had voted to abolish the position effective February 8, 1979. The letter indicated that to effectively avoid having to lay plaintiff off, plaintiff was being offered a promotion to the position of Recreation Supervisor II. In the letter Bedwell stated, "If you decide to accept the position of Recreation Supervisor II, please sign the attached job performance standard by February 8, 1979."

The Recreation Supervisor II position referred to by Bedwell in the letter was in a higher classification (and accordingly in a higher pay range) than the position of Youth Services Facility Director. Although duties of Youth Services Facility Director were incorporated into the new Recreation Supervisor II position offered plaintiff, some of the duties were different.

Plaintiff was never laid off from the position of Youth Services Facility Director, since he accepted the promotion to Recreation Supervisor II. At the time he accepted the

position he was not informed that he would hold a probationary status in that position for at least the first six months.

However, in inquiring about what his bumping rights might be, he was told by Mary Leydon that he didn't have any, that there were no positions in the Community Resources Department he could bump into. (RT 432:10-434:11; Tr. Ex. 16, 18, Excerpts, pp. 146, 148). Mary Leydon testified that the reason she didn't offer him any opportunity to bump into the position of Recreation Supervisor I at that time was "[p]rimarily because of his attitude towards Belle Haven, and how he perceived it to be alienated from the City." She indicated she had had previous discussions with plaintiff in which he had basically told her "...he felt people in Belle Haven weren't treated in the same manner." She indicated he had expressed to her that employees in Belle Haven weren't treated equally with the employees in the rest of the City, a viewpoint with which she disagreed. (RT 432:10-434:11).

Plaintiff had worked in the Belle Haven community, a predominantly Black community, as Youth Services Facility Director, for over four years. The primary employees of the City of Menlo Park's Belle Haven community program at the time were Black--Marie Blackburn, Robert Alexander, Aaron Johnson, and Paul Barbour. (Excerpts, pp. 99-100; RT 295:2-3; 296:3-6; 416:4-8).

Between January 1979 and the date he was terminated from his probationary promotional position (August 5, 1979), plaintiff was engaged in both written and oral communications with Mike Bedwell and Mary Leydon regarding questions about what his bumping rights and employment opportunities were, and about what would happen if he did not successfully perform in his probationary promotional position. Additionally, he repeated his concerns over affirmative action policies and possible bias of Menlo Park in its employment practices. Plaintiff, in reply, was never told that he had or would have bumping rights into any specific

position in the City of Menlo Park. From his communications with Mike Bedwell and Mary Leydon, plaintiff reasonably received the impression that he had no bumping rights either inside or outside the department. (See Tr. Ex. 12-19, 21, 25, 29, 31, 34, Excerpts, pp. 142-154, 157, 158, 161; RT 432:14-21; 312:5-13; 334:7-15; 350:13-352:24; 358:17-24; 369:20-370:19; 364:13-21; 262:15-263:20; 275:23-276:1; 526:8-527:9; 522:25-524:10).

Plaintiff satisfactorily completed his Recreation Supervisor II duties in connection with the After School Arts Program in the spring of 1979. (RT 527:10-15). The City of Menlo Park was satisfied with plaintiff's work in this regard.

The subject of lesson plans with regard to the summer program was the reason Mary Leydon stated she recommended Alexander's termination from the probationary position. In this regard, although Mary Leydon testified she first broached the subject of plaintiff getting in his lesson plans at the beginning of May

1979 in an oral conversation and repeatedly brought it up thereafter, plaintiff testified that the first time he heard any concern about lesson plans from Mary Leydon was on June 5, 1979, when he received a memorandum from her on the matter. Mary Leydon admitted in testimony that there was no written communication expressing her concern until June 5. Even the June 5, 1979, memorandum hardly communicated any substantial dissatisfaction. It was very short, saying only, "Robert, I don't consider your May quarterly report complete until I receive your daily lesson plans for the summer playground program. When may I expect them?" (Tr. Ex. 27, Excerpts, p. 156; RT 408:17-24; RT 410:10-411:16; RT 519:6-25).

In response to the June 5 memorandum, plaintiff submitted some lesson plans on or about June 9. Mary Leydon testified that this was the first inkling she had that plaintiff did not know how to prepare the lesson plans in the manner she wanted them. (RT 412:2-22).

On June 14, 1979, Mary Leydon gave

plaintiff sample lesson plans for a junior teen playground for one week with a cover memorandum explaining they were samples of how she wanted the lesson plans done. (Tr. Ex. V, Excerpts, p. 178). Mary Leydon admitted that on June 14, 1979 was the first time she gave plaintiff any samples of how she wanted the lesson plans done. (RT 438:9-12).

During Alexander's probationary period, he wrote a Policy Questions memorandum to Mary Leydon regarding sick leave, seniority, affirmative action, and vehicle mileage. Mary Leydon replied in a memorandum dated June 20, 1979 that she didn't want an allegation of "harassment" on her record, and wrote, "Believe it or not, Robert, I don't want that allegation on _my_ record, and want the opportunity to refute it, and will take whatever legal steps are necessary to insure that slander of this nature is not on my record. (Tr. Ex. W, Excerpts, pp. 179-180).

The orientation program for summer staff under plaintiff started on June 18, 1979, and

the summer program began June 25, 1979. (Tr. Ex. 26, 28). On June 29, 1979, Mary Leydon wrote plaintiff a memorandum, indicating that he was behind the timetable she had given him for lesson plans in her June 14, 1979 memorandum by two days. For the first time she made reference to his job performance standard, telling him that "you are not performing both your job performance standard and my memorandums." She did not, however, indicate to him that adverse job action was being contemplated. (Tr. Ex. 32, Excerpts, p. 160).

After receiving the memorandum, plaintiff had a conference with Mary Leydon, indicating his feelings regarding the whole matter. Their respective accounts of what happened in the meeting differ.

Mary Leydon wrote a memorandum expressing her view of what happened in the conference, in which she indicated that plaintiff had stated he thought she was "hassling" him, and that in reply she agreed that she was hassling him "because he was not fulfilling his job

performance standards." There was no allegation by Mary Leydon that plaintiff did anything physical to her, or that he threatened to do anything physical to her. (Tr. Ex. X, Excerpts, pp. 181-182).

Plaintiff denied that he had said anything to Mary Leydon in the June 29 conference about she better not "mess" with him, and indicated that he had been to a doctor because of the stress of the situation, and that the doctor had told him to tell her that he (plaintiff) felt she was on his back, and that she should get off his back. He further testified that in the June 29 conference he had replied to her allegation in her June 20 memorandum that he had "slandered" her and that she would take whatever legal action was necessary against him to clear her record of it, by telling her that he hadn't slandered her, and that he felt like she was hassling him rather than slandering her. Plaintiff stated that he had not in any way threatened her physically. (RT 70:18-72:24).

Plaintiff was out ill the entire next week. He came back to work on July 9, 1979. (RT 14:18-142:5). Mary Leydon testified that some time between June 29, 1979 and July 9, 1979 she decided to recommend plaintiff's termination from Recreation Supervisor II to Mike Bedwell, the City Manager (RT 439:12-22).

She wrote up a four-page memorandum, which was typed on, and dated, July 9, 1979, to Mike Bedwell recommending plaintiff's termination from the probationary promotional position, concluding that "Frankly, I feel that all of the above problems relate to the lack of lesson plans for the program." (Tr. Ex. 35, p. 4, Excerpts, p. 165). She further wrote, "At this point, I think it would be best to terminate Robert from this position and lay him off under the Personnel Rules which appluy to bumping, since there are no other jobs in this department that are available to him. As a department head, I will not go to any special lengths to `save' him and bump another employee." (Tr. Ex. 35, p. 1, Excerpts, p.

162).

In response to said memorandum, Mike Bedwell, City Manager, suspended plaintiff with pay on July 10, 1979. (Tr. Ex. 36, Excerpts, p. 166). On July 11, 16, and 24, he met with plaintiff to get plaintiff's version of the facts. On July 30, 1979, he wrote plaintiff, stating, "I find Mary Leydon's presentation to be substantially correct; your testimony and written material did not change the thrust of her complaint." The words "Mary Leydon's presentation" in his letter referred to her July 9, 1979 four-page memorandum recommending plaitniff's termination from Recreation Supervisor II. Mike Bedwell concluded the July 30, 1979 letter to plaintiff by stating, "Your position as Recreation Supervisor II is terminated as of August 5, 1979, and until that time you will be suspended without pay." (Tr. Ex. 39, Excerpts, p. 167).

Mike Bedwell admitted at trial that he knew plaintiff had bumping rights to the positions of Gym Director and Night Clerk, and that he

was qualified for said jobs. Bedwell testified that he had not told plaintiff about these positions or offered them to him because he thought such an offer would have "insulted" and "demeaned" plaintiff, causing plaintiff to be "angry", and that he thought plaintiff would not have been interested in taking either of the two jobs, anyway. (RT 350:13-352:24, 325:6-326:25).

Mary Leydon agreed plaintiff was qualified for the positions of Gym Director and Night Clerk in August 1979 and could have bumped into said positions. (RT: 423:4-427:12).

Both Mary Leydon and Mike Bedwell contended that plaintiff could not have bumped into Aaron Johnson's Recreation Supervisor I position in August 1979 because Aaron Johnson had special skills." Also, Mike Bedwell questioned plaintiff's qualifications for the position of Recreation Supervisor I in August 1979 based on his performance in the Recreation Supervisor II job. (RT 360:1-362:3; RT 424:14-425:6).

Plaintiff testified that in July-August

1979 he was confused as to what his bumping rights were, that he frankly did not know, and that despite repeated questions regarding his bumping rights from January 1979 through the date of his termination from Recreation Supervisor II he had never been given a definitive answer. (RT 526:8-527:9).

Plaintiff filed a retaliation charge against the City of Menlo Park with the Equal Employment Opportunity Commission on August 24, 1979. (Tr. Ex. 1, Excerpts, p. 106). The EEOC issued a Notice of Right to Sue letter on both his January 1979 and August 1979 charges on November 25, 1980. (Tr. Ex. 3, Excerpts, p. 109.) The complaint in the action herein on review was thereafter filed in the District Court in a timely fashion.

I. DEFENDANTS VIOLATED PLAINTIFF'S DUE PROCESS RIGHTS IN THEIR VIOLATION OF THEIR OWN RULES IN DEALING WITH PLAINTIFF.

Plaintiff was a permanent employee with the City of Menlo Park. Even under the personnel rules of the City, after he had been terminated from his probationary promotional position, he was not supposed to lose his status as a permanent employee. Plaintiff had a property interest in continued employment, and as such had a right to due process and the

benefit of rules adopted for his protection. See Roth v. Board of Regents, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

The City of Menlo Park violated a number of its own rules, the cumulative effect of which was to deprive plaintiff improperly, without just cause, and without due process of his employment *in toto* with the City. The case is not just about the bumping rules of the City that were violated, as the Court of Appeals in its decision ruled, but about many other rules, as well. The case offers the Supreme Court an opportunity to discuss to what extent a City must follow its own rules and regulations in dealing with one of its own employees, especially when his job status is at stake.

The City of Menlo Park violated the following rules and regulations in dealing with plaintiff: Rule II, Section 3-- failing to follow application procedures in terms of rejecting applicants once plaintiff lost his

probationary position; Rule IV, Section 1 and 3--failing to establish the standards for setting up and maintaining names on an eligibility list; Rule V, all sections--failing to utilize the probationary period in the fashion required under the rule, failing to extend plaintiff's probation, and failing return plaintiff to prior classification and non-probationary status in that classification to the pay step he would have had if he had not been promoted; Rule VII, Section 1--failing to take the responsibility for training plaintiff in his new position as required; Rule VIII, Section 3--failing to give plaintiff performance appraisals at least twice during the probation period; Rule X, Section 2--discharging plaintiff from City employment in toto without cause and without bases required; Rule X, Section 3--laying off plaintiff improperly without seniority and bumping rights; Rule XI, discharging plaintiff without giving plaintiff a written statement for the reasons for doing so.

II. THE COURT ERRED IN ITS ANALYSIS OF THE PROPER LEGAL STANDARD WHICH MUST BE APPLIED IN DETERMINING RETALIATION AND RACE DISCRIMINATION CLAIMS MADE UNDER TITLE VII AND 42 U.S.C. SECTION 1981.

A. THE COURT OF APPEALS DID NOT APPLY THE CORRECT LEGAL STANDARD IN DECIDING THE RACE DISCRIMINATION ISSUE.

Plaintiff proved a prima facie case of racial discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and the trial court, indeed, assumed this to indeed be the case. (See Decision of Trial Court, January 23, 1982). However, the trial court failed to use the chain of production required in Texas v. Burdine, 101 S.Ct. 1089, which would have required the defendants to articulate a legitimate reason for terminating plaintiff's employment in toto, and instead used a finding of fact process which the Supreme Court expressly repudiated in Connecticut v. Teal, 102 S.Ct. 2525 (1982). The trial court stated that "any inference of discrimination was dispelled and wholly rebutted by the heavy weight of the evidence,

which shows defendant to have conducted personnel practices in a fashion wholly free of racial bias or discriminatory intent, as is conclusively illustrated by the employment history of Aaron Johnson, during his period of employment with defendant." In *Connecticut v. Teal*, the Supreme Court clearly rejected the argument that an employer's favorable treatment of certain members of a minority group somehow immunizes an employer from liability for specific acts of discrimination against other minority employees.

The Ninth Circuit in its opinion approved the reasoning of the trial court's analysis of the race discrimination issue, holding that the aforesaid finding of the trial court was "not clearly erroneous".

The Supreme Court should grant this petition and review this case in order to clear up any confusion on the proper chain of proof and standard of proof to be applied in both disparate treatment and disparate impact in race discrimination cases.

B. THE COURT OF APPEALS DID NOT APPLY THE CORRECT LEGAL STANDARD IN DECIDING THE RETALIATION ISSUE.

42 U.S.C. Section 2000e-3(a) states that it is an unlawful employment practice for an employer to discriminate against any one of his employees..."because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, asisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

In Cohen v. Fred Meyer, Inc., 686 F.2d 793 (9th Cir. 1982), the Court stated that the proper chain of proof in a retaliation case is that a plaintiff must first establish a prima facie case of retaliation by showing that he engaged in a protected activity, that he was thereafter subjected by his employer to adverse employment action, and that a causal link exists between the two. See also, Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346 (9th Cir. 1984).

The Ninth Circuit in the case herein found no causal link. It is important that the Supreme Court address the issue of what constitutes a "causal link" for purposes of proving a prima facie case, and clear up any confusion existing in Circuit courts on this vital issue.

A "causal link" for purposes of establishing a prima facie case of retaliation can be shown by either the fact that the employer was aware that the employee had engaged in the protected activity prior to making its adverse employment decisions, or by the fact that the protected conduct was closely followed by adverse action. (See Cohen v. Fred Meyer, Inc., supra, at 796-797; Gunther v. County of Washington, 623 F.2d 1303, 1316 [9th Cir. 1979]; Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 341 [10th Cir. 1982]; Love v. Re/Max of America, Inc., 738 F.2d 383, 386 [10th Cir. 1984]; Burrows v. Chemed Corp., 567 F.Supp. 978, 986 [E.D. Mo. 1983], aff'd, 743 F.2d 612 [8th Cir. 1984].)

The Court of Appeals failure to find a causal link simply cannot be reconciled with the facts in this case. In the instant case, plaintiff engaged in repeated instances of protected conduct, which were very shortly thereafter followed by adverse employment action, including termination from his probationary postion and termination from his employment in toto. It is time for the Supreme Court to clearly define what chain of proof should be required in a retaliation case, and set a uniform standard on this issue.

After plaintiff filed his discrimination charge on January 15, 1979, and the date Mary Leydon recommended plaintiff be terminated on July 9, 1979, a series of events occurred representing protected conduct on plaintiff's part followed closely by adverse employment action on defendant's part. On February 8, 1979, plaintiff wrote a letter to Mike Bedwell protesting defendant's bumping policies as full of "bias". (Excerpts, 148). On March 23, 1979, Mike Bedwell wrote back in a

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nner evidencing adverse employment action.

addition to erroneously describing aintiff's bumping rights, Bedwell for the rst time criticized plaintiff's performance Youth Services Director. (Excerpts, 150). is criticism stands in sharp contrast to the nsistently positive feedback plaintiff had ceived since 1974 regarding his performance that job from various supervisors, including ke Bedwell and Mary Leydon, and also is reconcilable with the promotion he had ceived in January 1979 based on his favorable rformance in the Youth Services Director job. ee Excerpts, 129, 130, 131, 132, 133-137, 2, 143, 144; Tr. Ex. 51.). Furthermore, he d been promoted to the position of Recreation pervisor II, based on a positive view of his rformance in that position. Bedwell's sudden out-face attempt to create a negative written cord of Alexander's performance in a job he longer held must be viewed as an adverse ployment action closely following Alexander's gaging in protected conduct--and indeed in

direct reply to Alexander's February 8, 1979 letter which was protected conduct.

Thereafter, plaintiff continued to inquire about his bumping rights (rights which or February 8, 1979, plaintiff had alleged were being administered in a biased fashion). Defendant replied to Alexander's continuing pattern of protected conduct by a series of adverse employment actions and rules violations, e.g., refusing to reimnburse Alexander for use of his vehicle on the job, excoriating plaintiff for his lesson plans even though a look at his job description shows it was a very small part of his job (Excerpts, 138), failing to give Alexander the two formal evaluations it was required to give him in a probationary position even though it had given him but not the other Recreation Supervisor II person a written job performance standard (Rule VIII, Section 3, Excerpts, 120; Tr. Ex. 43), and then terminating him from his probationary position even though it had given him no real feedback that his performance on lesson plans

was unsatisfactory until June 29, 1979 (Excerpts, 160), and even though Alexander had <u>indisputably</u> performed the rest of his probationary position from February 9, 1979 to July 1979--including the After School Arts program, the counseling and job development activities, and the summer playground program not including the lesson plan aspect--satisfactorily, as well as having proved himself highly capable in the position of Youth Services Facility Director for over four years prior to that.

It should also be noted that in a letter dated July 9, 1979 (Tr. Ex. 34; Excerpts, 161), which was not typed until July 16, 1979, plaintiff wrote to Mary Leydon responding to her June 29, 1979 memorandum to him (Tr. Ex. 32; Excerpts, 160) and to remarks made to him by her regarding her view that his performance in the probationary position had been unsatisfactory. In said letter (Tr. Ex. 34; Excerpts, 161), he indicated that he believed the negative action she was taking

against him with regard to the probationary position was a culmination of the long-standing dispute with him about affirmative action policies of the City of Menlo Park. He further indicated in said letter that she appeared to direct negative actions "particularly at minority employees." On July 30, 1979, only two weeks after receipt of this letter, the City of Menlo Park chose not only to terminate plaintiff from his probationary position, but also made a conscious decision to deny him his bumping rights.

All of the above indicates a course of protected conduct engaged in by plaintiff followed closely by adverse conduct engaged in by defendants. A causal link was shown.

The causal link is further shown by the failure of Menlo Park to follow its rules in way it dealt with plaintiff. These rules violations have already been enumerated previously.

The trial court found <u>no</u> evidence of retaliation, and the Ninth Circuit found no

prima facie case of retaliation. Obviously, the right chain of proof standard was not used, and the factors that make up a causal link not clearly understood.

Part of the confusion may have been a confusing of the issues of race discrimination and retaliation in the analysis that took place by both the trial court and the Ninth Circuit. The two distinctly different issues seemed to be tossed together and treated summarily, rather than analyzed separately under the applicable legal standards pertaining to each.

It should be noted, as well, that the Court of Appeals in its decision noted that the trial court "rejected Alexander's section 1981 claim without discussion". The summary treatment of both Alexander's Section 1981 claim and Title VII claim is something which appeals courts should not allow. Rather, an elaborate, clearly defined chain of proof analysis, as suggested herein, should be followed. There is much room for error if a trial court does not follow the correct

procedure in determining either a race discrimination or retaliation case. The Court should take this case and insist that trial courts follow a clearly delineated standard of proof in reaching their conclusions on Title VII and 1981 issues. Any conclusion regarding discrimination or retaliation by a trial court which was not arrived at by a clearly and carefully defined chain of proof analysis according to the prescribed legal standard is highly suspect and should be vacated and reversed. The trial court should then be required on remand to make a determination of the issue anew pursuant to applying the correct chain of proof and legal standards of proof which are mandated. (See, for example, the very opinion in this case, Alexander v. City of Menlo Park, 787 F.2d 1371 (9th Cir. 1986), which indicates that when a fact determination on a due process issue is based on an erroneous burden of proof standard, the decision must be vacated, and the matter remanded.)

The different circuits seems to have

adopted somewhat different tests on the legal standards applicable to determining a retaliation question, and it is time for the Court to devise a uniform set of standards. (Compare, for example, the standards set forth in Cohen v. Fred Meyer, Inc., 686 F.2d 793 (9th Cir. 1982); Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346 (9th Cir. 1984); Whatley v. Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325 (5th Cir., Unit B, 1980); Simmons v. Camden County Board of Education, 757 F.2d 1127 (11th Cir. 1985).

DATED: September 22, 1986

ROBERT ALEXANDER

By________________________

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CERTIFICATE OF SERVICE

I declare that I am over the age of 18 ars, a citizen of the United States. On ptember 22, 1986, I served the within BRIEF OF TITIONER on the defendants/respondents in said use, by placing a true copy thereof, enclosed a sealed envelope with first-class postage ereon fully prepaid, in the United States mail San Francisco, CA, addressed as follows:

John R. Cosgrove, Esq.
JORGENSON, COSGROVE, SIEGEL & McCLURE
1100 Alma Street, Suite 210
Menlo Park, CA 94025

I declare under penalty of perjury that the regoing is true and correct, and was executed September 22, 1986, at San Francisco, lifornia.

Robert Alexander

In the Supreme Court of the United States

October Term 1986

No. ____________

ROBERT ALEXANDER,

Petitioner

-v-

CITY OF MENLO PARK,
MIKE BEDWELL,
Manager of City
of Menlo Park,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ROBERT ALEXANDER
2785 Hunter Street
E. Palo Alto, CA
(415) 326-4527

Petitioner In Propria
Persona

APPENDIX

Court of Appeals Opinion, April 24, 1986

Order of Court of Appeals Denying Petition for Rehearing

Order of Court of Appeals, May 12, 1986

U.S. District Court Memorandum of Decision, July 28, 1983

Decision of U.S. District Court, May 20, 1984

Judgment of U.S. District Court, May 24, 1984

Order of U.S. District Court for New Trial and Setting Aside Judgment

Decision of U.S. District Court, July 23, 1982

Judgment of U.S. District Court, July 23, 1982

42 U.S.C. 1981

42 U.S.C. 1983

42 U.S.C. 2000e-2

42 U.S.C. 2000e-3

42 U.S.C. 2000e-5

Personnel Rules of Menlo Park

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT P. ALEXANDER, *Plaintiff-Appellant,* v. CITY OF MENLO PARK; MIKE BEDWELL, City Manager of City of Menlo Park, *Defendants-Appellees.*	No. 84-2150 D.C. No. CV 80-4369-WAI
ROBERT P. ALEXANDER, *Plaintiff-Appellee,* v. CITY OF MENLO PARK, *Defendant-Appellant.*	No. 84-2189 D.C. No. CV 80-4369-WAI OPINION

Argued and Submitted
June 11, 1985—San Francisco, California

Filed April 24, 1986

Before: James R. Browning, Chief Judge, Jerome Farris and
Dorothy W. Nelson, Circuit Judges.

Per Curiam

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

SUMMARY

Employment Discrimination

Appeal by plaintiff from a judgment for the defendant on a Title VII claim and an award for plaintiff of only nominal damages in an action brought under 42 U.S.C. § 1983. Cross-appeal by defendant of the award of attorney's fees for the plaintiff. Affirmed in part, reversed in part, vacated in part and remanded.

Plaintiff served as Youth Services Director for a city until the city council voted to abolish the position. The city manager offered plaintiff the choice of being laid off or accepting a probationary promotion to the job of Recreation Supervisor II, and plaintiff chose the promotion. At the end of the probationary period his new supervisor found his performance inadequate and upon her recommendation the city manager terminated plaintiff. He sued, alleging causes of action under 42 U.S.C. §§ 1981 and 1983 and Title VII, 42 U.S.C. §§ 2000e-2 and 2000e-3. After trial the district court determined that when plaintiff was terminated he had a right to be returned to his earlier job, and if it was not available the right to bump persons holding the jobs of gym director or night clerk. The court computed back pay at the level of these jobs and reduced it by half, because the plaintiff's efforts in mitigation were limited, and subtracted the amount already paid as unemployment insurance, awarding plaintiff $11,000. The Title VII claim was rejected. At a new trial limited to the issue of damages the court reduced the damage award to one dollar on the ground that plaintiff did not show he would not have taken the lower paying job if offered. The court awarded plaintiff's lawyers fees and costs.

[1] Appellant's argument that the city did not formally abolish his old position at the time he should have been returned to it after failing the probationary promotion is not

supported by the record, which shows unequivocally that the position was abolished before plaintiff accepted the probationary promotion. [2] The evidence before the court was sufficient to support the findings that plaintiff was not qualified for the Recreation Supervisor I job [3] and that the person presently holding the job possessed special skills necessary for the position.

[4] The plaintiff had a legitimate claim of entitlement to bumping rights to other particular positions within the city and this was a constitutionally protected property interest which he was deprived of without due process. [5] The city's argument that plaintiff would have turned down the positions if offered has no bearing on whether he was denied due process. [6] The evidence suggests plaintiff was not aware of his bumping rights. [7] No city administrative appeal was available to him.

[8] The district court erred when it shifted the burden of proving compensable injury to the plaintiff in the second trial. [9] The due process violation was the failure to inform the defendant of his right to bump into certain jobs and the injury was unemployment. Whether or not he would have exercised his bumping rights raises the question of whether the violation was the proximate cause of the injury. [10] Where a plaintiff has proven unlawful discrimination in promotion it is the defendant's burden to prove plaintiff would not have been hired or promoted even absent the discrimination. [11] Plaintiff proved a violation of his due process rights so the burden was on the defendants to show the plaintiff would not have accepted either position. Because the district court improperly put the burden of proof on the defendant the case must be reversed for a determination under the proper standard. [12] Emotional distress should also be considered on remand.

[13] The court's findings on the Title VII claims that plaintiff's failure of probation was not the result of discrimination

but of failure to perform are not clearly erroneous. [14] Because the case is remanded for additional proceedings the city's appeal of the award of attorney's fees is not reached.

COUNSEL

Louis Highman, San Francisco, California, for the plaintiff-appellant.

Jorgenson, Cosgrove, Siegel & McClure, and John R. Cosgrove, Menlo Park, California, for the defendants-appellees.

OPINION

PER CURIAM:

Robert Alexander appeals a judgment against him on his Title VII claim and an award of only nominal damages on his section 1983 claim, in a suit against the City of Menlo Park, California. The City appeals the award of attorney's fees to Alexander's counsel. We affirm in part and reverse in part.

I.

Alexander, a black man, served as Youth Services Facility Director for Menlo Park. The City Council voted to abolish the position. Mike Bedwell, City Manager, offered Alexander the choice of being laid off or accepting a probationary promotion to the job of Recreation Supervisor II. Alexander accepted the new job.

During Alexander's probation, he had several confrontations with Mary Leydon, his department head. At the end of the probationary period Leydon found Alexander's performance inadequate and recommended he be terminated. Bedwell terminated Alexander.

Alexander sued, alleging causes of action under 42 U.S.C. §§ 1981 (1982) and 1983 (1982), and Title VII, 42 U.S.C. §§ 2000e-2 (1982) and 2000e-3 (1982).

After trial, the district court held Alexander had been denied procedural due process in violation of section 1983. The court ruled that when Alexander was terminated from the probationary position, under City rules he "had a right to be returned to" his earlier job or another at the same level; and, if no such job was available, he "was entitled to bumping rights." The court found Alexander had been wrongfully denied these "bumping rights" as to the jobs of gym director or night clerk. The court computed Alexander's back pay award at the level of these jobs, divided the amount by two "[b]ecause his efforts in mitigation of damages appear to be less than vigorous," subtracted the amount already paid to Alexander as unemployment insurance, and awarded Alexander $11,114.03.

The court rejected Alexander's Title VII claim because he had failed to rebut the City's evidence of nondiscriminatory employment practices and had offered no evidence of retaliatory discharge. The court rejected Alexander's section 1981 claim without discussion.

On Alexander's motion, the court ordered a new trial confined to the issue of damages. After trial, the court reduced the damage award to one dollar on the ground that the City's failure to accord Alexander the right to bump into the gym director or night clerk jobs caused no "compensable injury" because he would not have taken either job. The court awarded Alexander $21,508 in attorney's fees and $744.18 in costs. Both sides appeal.

II.

City Rules provide that a probationary "employee deemed unsatisfactory for [appointment to the permanent] position

shall return to prior classification and non-probationary status." Alexander therefore had a right to be returned to a job in the same classification as his prior job. However, as noted, the City Council had abolished the position of Youth Services Facility Director and the City had no other position in that classification.

[1] Alexander contends his former position was not "formally" abolished at the time he should have been returned to it after failing the probationary promotion. The record shows unequivocally, however, that the City Council abolished the position of Youth Services Facilities Director before Alexander accepted the promotion. The Council did not have to do so again.

III.

Since Alexander could not be returned to his original job or one in the same classification, he was entitled under City Rules either to bumping rights or, if he had no bumping rights or chose not to exercise them, to severance pay.

City Rules would permit Alexander "to displace a less senior employee in the same department who occupies a position which the more senior employee is qualified to occupy in the judgment of the department head" unless the department head and City Manager determine that the less senior employee has special skills such that displacement would impede or impair the operation of the department.

The district court found Alexander could not bump into the Recreation Supervisor I position held by Aaron Johnson, because "neither [Leydon nor Bedwell] would have approved [his] displacement of Aaron Johnson or of any employee outside of the . . . department."

Although the district court's language did not track City Rules exactly, it is evident the court found that Bedwell and

Leydon had determined Alexander was not qualified for the job of Recreation Supervisor I and that Johnson had "special skills" without which the operation of the department would be impaired.

[2] The evidence before the court was sufficient to support such findings. Leydon testified Alexander was not qualified for the Recreation Supervisor I job in part because he did not know how to prepare lesson plans which were an important part of the job. (It was largely because of this inability that she had recommended Alexander be terminated from his probationary position.) She also testified the Recreation Supervisor I job required developing a new program and was more difficult than the Recreation Supervisor II job, which involved working with existing programs. She doubted Alexander's ability to work far from close supervision and assistance and to fit in at Belle Haven, a predominantly black community, because of his view that that community was treated differently from the rest of the city.

In contrast, the only evidence suggesting Alexander was qualified was his past experience and receipt of favorable recommendations as Youth Services Facility Director (offset by Bedwell's testimony that Alexander had not performed well in that position) and his promotion by Bedwell and Leydon to Recreation Supervisor II. Alexander offered only uncorroborated testimony that as Youth Services Facilities Director he successfully developed new programs, and hired and supervised assistants.

[3] Johnson's special skills included a masters degree in Recreation Administration, special talent dealing with children and preparing programs for them, and the "ability to deliver information to the City Council . . . regarding the post." Leydon testified she "couldn't have been more pleased" with his work and her testimony suggested replacing him would interfere with the working of the Parks Department. Alexander offered no evidence to the contrary.

IV.

The district court held Alexander was wrongfully deprived of his right to bump into the next less-senior classification—specifically, the job of gym director or night clerk.

[4] Alexander had a legitimate claim of entitlement to bumping rights to particular positions under City Rules, and thus a constitutionally protected property interest. *See Board of Regents v. Roth,* 408 U.S. 564, 576-77 (1972). Under the test established by *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), Alexander was deprived of that property interest without due process. The weight of "the private interest," *id.*, involved was substantial—Alexander's opportunity to continue his employment, maintain his income, and protect his reputation. *See, e.g., Jordan v. City of Lake Oswego,* 734 F.2d 1374, 1376 (9th Cir. 1984). The "risk of an erroneous deprivation," *Mathews*, 424 U.S. at 335, was also substantial. Bedwell testified he did not offer Alexander bumping rights as to the jobs of gym director or night clerk because he thought Alexander would feel "demean[ed and] angry." Such subjective assessments of another's potential emotional reactions are often inaccurate. Alexander himself testified that he would have accepted the jobs. The "[g]overnment's interest," *Mathews*, 424 U.S. at 335, in the procedure followed was negligible. Neither the financial nor operational cost of affording Alexander the opportunity to take one of the two jobs was significant.

[5] The City argues that Alexander suffered no loss because he would not have accepted either of the two available positions had they been offered. Whether Alexander suffered loss, however, has no bearing on whether he was denied due process. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978).

[6] The City's claim that Alexander knew his bumping rights but chose not to exercise them is also unavailing. The

record strongly suggests Alexander was unaware of his bumping rights and therefore unable to exercise them.

[7] Nor did Alexander fail to exhaust his right to an administrative appeal. None was available to him. City Rules did not permit an appeal from a failure of probation, a layoff, or an informal discharge. Only a formal discharge is appealable, and a denial of bumping rights cannot be so characterized. Further, exhaustion of remedies is not required under section 1983. *Monroe v. Pape,* 365 U.S. 167, 183 (1961).

We also reject the City's claim that Alexander had already been given bumping rights when his original position was abolished and therefore was not entitled "to further reemployment rights at the expense of another employee" when he failed his probationary employment. Alexander was given no bumping rights when his original position was abolished—he was not laid off but provisionally promoted. Moreover, even if he had received bumping rights when his position was abolished he was nonetheless entitled to such rights when finally terminated; under the Rules bumping rights were mandatory whenever an employee was laid off.

[8] The district court originally held that whether Alexander would have taken the gym director or night clerk job was relevant to mitigation of damages and on this issue the City had the burden of proof. At the new trial, however, the court held Alexander had the burden of proving he suffered compensable injury by showing he would have taken one of the two jobs if offered. We agree with plaintiff that the court erred when it shifted the burden of proof.

[9] The due process violation was the failure of the defendants to inform the plaintiff of his right to bump into the job of gym director or night clerk. The injury suffered by plaintiff was unemployment. Whether Alexander would have exercised his bumping rights with respect to one of these jobs, had

he been informed of them, raises the question whether the violation was the proximate cause of the injury.

Where a public employee is terminated without just cause, the question of proximate cause does not arise because the violation is so closely connected to the harm suffered. Where, on the other hand, a public employee is terminated with cause, but without required procedural protections (e.g., a hearing), the question of proximate cause arises—would the employee have been terminated even if the proper procedures had been observed? In such cases the Supreme Court has approved the placement of the burden of proof on the party who committed the violation. See *Carey v. Piphus*, 435 U.S. at 260.

[10] We have followed the same rule in cases under Title VII. Where a plaintiff has proven unlawful discrimination in hiring or promotion, it is the defendant's burden to prove plaintiff would not have been hired or promoted even absent the discrimination. *Nanty v. Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981); *League of United Latin American Citizens v. City of Salinas Fire Department*, 654 F.2d 557, 558-59 (9th Cir. 1981). The reason for this rule is simple: "The burden of showing that proven discrimination did not cause a plaintiff's rejection is properly placed on the defendant-employer because its unlawful acts have made it difficult to determine what would have transpired if all parties had acted properly." *League*, 654 F.2d at 559.

[11] Alexander proved the defendants violated his due process rights by failing to inform him he could bump into either of two positions. The burden is on the defendants to show Alexander would not have accepted either position absent their unlawful conduct. Because the district court improperly imposed the burden of proof on this issue on Alexander, we remand for a determination under the proper standard. *See Muntin v. California Parks and Recreation Department*, 671 F.2d 360, 363 (9th Cir. 1982).

[12] On remand, the district court should also determine whether Alexander suffered emotional distress as a result of the denial of his bumping rights. Harm due to "mental and emotional distress" is clearly "compensable under 42 U.S.C. § 1983," providing the plaintiff "demonstrate[s] that [his] injury resulted directly from the wrongful deprivation of due process." *Jones v. Los Angeles Community College District*, 702 F.2d 203, 207 (9th Cir. 1983); *see also Carey v. Piphus*, 435 U.S. at 264.

V.

Alexander's Title VII claim alleged a failure to inform him of available higher paying jobs, retaliation for filing a complaint with the EEOC and criticizing the City's affirmative action program, and discriminatory treatment with respect to training and performance reviews. The district court held,

> [A]ny inference of discrimination was . . . wholly rebutted by the heavy weight of the evidence, which shows defendant to have conducted personnel practices in a fashion wholly free of racial bias or discriminatory intent . . . .
>
> . . .
>
> [P]laintiff's failure of probation was not the result of retaliatory discrimination, but of plaintiff's failure, after repeated notice, to perform a significant part of his job.

[13] These findings are not clearly erroneous. In short, Alexander failed to show any causal link between his protected activity—his complaints and EEOC charges—and defendants' failure to advise him of his bumping rights. *See Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). The failure to inform Alexander of his bumping rights occurred more than six months after the first EEOC complaint and

before the second complaint. Alexander's statements concerning the City's affirmative action plan were made more than a year before his termination. There is ample evidence that the reasons behind any adverse employment action after termination were Leydon's assessment of Alexander's abilities and perhaps a fair, if mistaken, belief that Alexander was not entitled to bumping rights.

VI.

[14] Because we remand for further proceedings that may affect the result, we do not reach the City's cross-appeal concerning attorney's fees. The award of attorney's fees is vacated, and the parties may present their contentions to the district court.

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED for further proceedings consistent with this opinion.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT P. ALEXANDER,

Plaintiff-Appellant,

v.

CITY OF MENLO PARK;
MIKE BEDWELL,
City Manager of
City of Menlo Park,

Defendants-Appellees.
/

No. 84-2150

D.C. No.
CV 80-4369-WAI

ROBERT P. ALEXANDER,

Plaintiff-Appellee,

v.

CITY OF MENLO PARK,

Defendant-Appellant.
/

No. 84-2189

D.C. No.
CV 80-4369-WAI

ORDER

Before: BROWNING, Chief Judge, FARRIS and NELSON,
Circuit Judges.

The court's opinion in this case filed April 24, 1986, (787 F.2d 1371), is amended as follows:

1. Delete lines 40-47, column 1, page

1376, beginning with the words "The failure" and continuing through the words "his termination." (Slip op. page 11-12 last paragraph)

2. At page 1376, column 1, line 49, delete the words "after termination." (Slip op. page 12 line 4)

The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT ALEXANDER, Plaintiff-Appellant/ Cross-Appellee, vs. CITY OF MENLO PARK; MIKE BEDWELL, City Manager of City of Menlo Park, Defendants-Appellees/ Cross-Appellants.	FILED May 12, 1986 Clerk, U.S. Court of Appeals CA 84-2150 CA 84-2189 CV 80-4369 WAI ORDER

Before: BROWNING, Chief Judge, FARRIS & NELSON, CJJ

Each party shall bear its own costs.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER, No. C-80-4369 WAI

Plaintiff, MEMORANDUM OF DECISION

-v-

CITY OF MENLO PARK,
and MIKE BEDWELL,
City Manager of
CITY OF MENLO PARK,

Defendants.
_______________________/

This matter came duly on for new trial on the issue of damages and the Court having considered the testimony, documentary evidence and the argument of counsel, now finds in favor of plaintiff on the issue of damages resulting from the violation of due process previously found by the Court, and assesses only nominal damages in favor of plaintiff in the sum of ONE DOLLAR ($1.00).

Plaintiff has abandoned his original claim for reinstatement. At trial two primary issues were presented to the Court:

1) Did plaintiff sustain actual injury sufficient to entitle him to compensatory

damages where the wrong of which plaintiff complains is a denial of procedural due process of law?

2) If plaintiff has shown his entitlement to compensatory damages, has defendant sustained its burden of proof in showing a want of reasonable diligence on the part of plaintiff to mitigate the damages found to be due him? The Court answers the first inquiry in the negative and by reason of that finding does not reach the issue of mitigation as encompassed within the second issue.

With respect to the first issue, it is the contention of defendant that plaintiff has incurred no compensable injury because the evidence preponderates in favor of the notion that plaintiff would not have bumped into the gym director position or the night clerk position if he had been advised of his right to do so.

In Carey v. Piphus, 435 U.S. 247 (1978), the court held the recovery of more than nominal damages for a denial of procedural due process

requires proof of actual injury, and approves the use of the tort measure of damages in cases where the interest infringed by the claimed due process denial is an interest protected in parallel fashion by tort concepts.

In the instant case, the interest of plaintiff claimed to be infringed is that of holding a job and being paid the salary of such a job into which he would have bumped, but for the deprivation of procedural due process. Such an interest may also be cognizable under either tort or contract principles.

Other circuits have refused to allow damages in deprivation of procedural due process cases in the absence of proof of injury.[1] Where, on the other hand, a plaintiff proves actual substantive injury resulting from a denial of procedural due process, there is an entitlement to compensatory damages. Carey, supra.

Plaintiff suggested in argument at trial that the due process defect in issue here is substantive rather than procedural, and has

previously suggested (Memorandum in Support of Motion for New Trial) that the defect, although procedural, deprived plaintiff of a substantive right, that of holding the job into which he was entitled to bump. The Court is of opinion, as were both counsel until the time of argument at trial, that the failure of the City to adhere to its own rules constitutes a procedural violation. Vitarelli v. Seaton, 359 U.S. 535 (1959).

Implicit in plaintiff's damage claim is the question of whether or not plaintiff would have exercised his bumping rights if they had been offered. In assessing liability in this case, this Court held in its decision of July 23, 1982, that for purposes of establishing a violation of plaintiff's rights under the rules promulgates by the City, whether plaintiff would have exercised his bumping rights or not was not of consequence. In the assessment of damages, however, it is of consequence, because in order to recover more than nominal damages, plaintiff must prove compensable injury. The conduct of

the City in failing to accord plaintiff his bumping right is only compensable if plaintiff was thereby denied a job which he would have otherwise taken. The burden is upon plaintiff to prove the elements of his injury and resulting damages. Carey, supra; Wilson v. Taylor, supra.

A careful consideration of the evidence in this case does not convince the Court by a preponderance of the evidence that plaintiff would have taken the job of gym director or that of night clerk if he had been accorded the opportunity to bump into them. At the first trial of this action, plaintiff testified that he "might have been interested" in the positions.[2] At the retrial of the damage issue, plaintiff testified that "in retrospect" he would have taken the job of gym director. On cross-examination he testified that the period of "retrospect" was since the last trial. The testimony just referred to lack probative force.

The evidence elicited at the first trial very strongly suggests that plaintiff would not

have bumped into either of the jobs available to him for bumping. As the Court pointed out in its first Memorandum of Decision in this case, bumping into those jobs was wholly at variance with plaintiff's employment orientation as revealed at the first trial. Nothing occurred at the second trial, other than plaintiff's testimony above referred to, to alter that evidentiary impression.

Plaintiff offered in evidence his answers to the first set of written interrogatories, specifically to interrogatory No. 5, which answers were filed herein on August 17, 1981, and a supplementary set of answers to the same interrogatory filed herein on April 21, 1983. Those answers set forth in 69 separate subparts efforts made by plaintiff to achieve employment from approximately August 1, 1979, up until the time of the retrial on the issue of damages, which was early May 1983. Of the 69 separate subparts, 34 set forth application for specific positions and the rest are either related to unspecified positions or recount the making of

inquiries or the circulation of resumes.

The specific job applications do not disclose the salary ranges of the specific position sought, but the job titles of many [3] demonstrate probable non-comparability with custodial jobs such as gym director and night clerk (Exhibit SS). No answers reveal application for custodial or other lower level jobs comparable to gym director or night clerk except the night clerk application which was never perfected by submitting to interview, and possibly the applications made to savings and loan institutions. There is no evidence of the type of position sought at Hewlett-Packard, College of San Mateo, California State University at Hayward, California State University at San Francisco, Kaiser Alumininum, Bay View Savings and Loan, Home Savings and Loan, Stanford Research Institute, Stanford University, United Airlines, Sequoia Union High School District, Digital Equipment Corporation, Ray Chem Industries, IBM, Ampex, Foothill-DeAnza, Peralta Community College, except that

at most of them a resume was left. From this circumstance, it may be inferred that plaintiff did not apply at those places for work comparable to gym director or night clerk, inasmuch as his resume discloses no such work experience. (Exhibit 55).

Richard Knowdell, testifying as an expert, stated based upon his examination of plaintiff's resumes (Exhibit 55) that plaintiff was unqualified for 19 of the positions for which he applied, was qualified to fill 4 such positions, and that 7 of the employers listed had no jobs appropriate to plaintiff's skills as listed in his resumes. Knowdell stated that he had insufficient information upon which to form an opinion with respect to three of the listed applications. Witness Hall, also testifying as an expert, did not specifically express an opinion as to plaintiff's qualifications for the specific jobs listed.

Defendant has offered evidence to show a number of jobs for which it contends plaintiff was qualified, which were available to him, and

were advertised in the local press and for which plaintiff did not apply. They are illustrated by Exhibits A-7, A-9, A-10, A-12, A-13, and A-14; A-34c A-44 (same job); A-41, B-8, B-9, B-10, B-11, B-13, B-15, B-10, B-12, B-14, B-16; B-1, B-30, B-59; and B-27. Exhibit A-7 is a newspaper ad appearing in the Peninsula Times Tribune for November 10, 1979, concerning the job of youth recruiter in the South San Francisco, Daly City, Half-Moon Bay Area, requiring knowledge of special problems of disadvantaged youth and paying a salary of $1,040.00 per month. Exhibit A-9 is an ad for the position of job developer requiring job development experience and knowledge of the CETA program. It paid $10,744 to $14,196 annually and was located in East Palo Alto. The ad was published in the Peninsula Times Tribune on November 23, 1979. Exhibit A-10 was published in the Peninsula Times Tribune on November 24, 1979, and concerns the same job as does Exhibit A-9. Exhibits A-12, A-13, and A-14 concern the same job as does Exhibit A-9 and were published

in the Penisula times Tribune on November 28, 29 and 30, 1979, respectively. Exhibits A-43 and A-44 each concern positions of placement specialists in a youth employment program situated in San Mate County and required either a B.A. in social science or four years of experience in working with disadvantaged youth, and paid $1,263 per month. Exhibits A-43 and A-44 were published in the Penisula Times Tribune on April 19 and 21, 1980, respectively. Exhibit A-41 concerns a job with the Redwood City CETA program described as counselor-aide trainer and requiring a B.A. in counselling or a related field or equivalent ejducation and experience and paying $850 - $950 per month. Exhibits B-1, B-30, and B-59 each concern the position of vocational counselor with the Singer education division of the San Jose Job Corp, requiring a bachelor's degree and two years experience in career planning, job placement, or vocational counselling, for the purpose oof counselling students age 16 through 21. Each of the exhibits were published in the San Jose Mercury

News on September 23, 1979, June 15, 1980, and November 23, 1980, respectively. Kenneth Dugan testified that the salary level for the jobs advertised in Exhibits B-1, B-30, and B-59 was $850 - $950 per month. Exhibits B-8, B-9, B-11, B-13, and B-15 concern a position called counselor interviewer and were published in the Peninsula Times Tribune on March 25, 26, 27, and 29, 1980, respectively. Sharon Wemple testified that the job was in a training school for the economically disadvantaged, that a bilingual ability was preferred, and that the job paid $16,000 per year. The job was with Opportunities Industrial Center West of Menlo Park. Exhibit B-10 concerns a job called job developer also with OICW of Menlo Park, requiring developing jobs for graduates and paying $16,000 per year and not requiring bilingual ability (testimony of Sharon Wemple). Exhibit B-10 was published in the Peninsula Times Tribune on March 26, 1980. Exhibit B-16 is the same job as B-10 and was published in the Penisula Times Tribune on March 31, 1980.

Exhibit B-27 concerns a job called administrative aid to CETA program coordinator, paid $17,234 - $20,966 annually, required a bachelor's degree in public administration, recreation administration, business administration or a related field and experience with CETA. It was published in the San Jose Mercury News on June 8, 1980, by the City of Sunnyvale. Defendant's expert Knowdell testified on cross-examination that based on the ad B-27, plaintiff would not be qualified for the position and that it would not be unreasonable for him to fail to apply for it.

Yolanda Irigon, who gathered the exhibits above-referred to testified that they were selected because they appeared to match plaintiff's employment qualifications. She also testified that positions such as gym director and night clerk are not usually advertised, but that vacancies are made known in a less formal manner.

Therefore, the evidence reveals but little evidence that plaintiff searched for jobs

comparable in pay and responsibility to those of gym director or night clerk. On May 4, 1983, plaintiff testified that he applied for part-time jobs with San Mateo County and with Redwood City. He did not specify what the jobs were. He also stated that he applied to temporary job agencies. He specified neither the agencies nor the job. The answers to interrogatory No. 5 list no employment agencies other than "headhunters" which plaintiff testified were concerned with high technology jobs.

On cross-examination on May 4, 1983, plaintiff testified that job listing No. 29, in the answers to first set of interrogatories was a part-time job. That job is described as counselling with Sequoia Union High School District. Plaintiff referred also to job No. 17, first answers, which are described as positions with the College of San Mateo. On the supplemental answers, plaintiff referred to job No. 6, the night clerk job with Menlo Park; job No. 8, instruction designer, College of San Mateo, which plaintiff said could have been

part-time; job no. 11, production assistant, College of San Mateo, which plaintiff said could have been part-time and job No. 19, media service technician, Skyline College. Plaintiff does not know the pay ranges of any of the part-time jobs for which he applied, and there is no other evidence tending to show them. Plaintiff testified that many of the jobs for which he applied carried salaries in the range of $1,500 - $1,600 per month. It thus appears both from the evidence from the first trial and from the job-seeking efforts elicited in some detail during the second trial, that plaintiff's employment orientation is not conformable with such jobs as gym director and night clerk. The episode regarding the night clerk interview, gone into in some detail at trial, illustrates this point. It was plaintiff's testimony that he sought to postpone his scheduled interview with the oral interview board in order that he might attend an "open house" conducted by Bank of America. Although the evidence is somewhat conflicting with respect to the exact content of

the two telephone conversations which plaintiff had with employees of the City at that time, it is clear to the Court that the night clerk job took a "back seat" to the "open house". The scheduled interview for the job of night clerk was for September 30, 1981. The evidence before the Court indicates that in the jobs actually sought by plaintiff as reported in answers to written interrogatory No. 5 and the supplements thereto, and those which might have been available for him had he sought the positions as illustrated by the defense exhibits here and above-referred to involving the newspaper ads, reveals a considerable disparity between the type of work in which plaintiff was interested and that which he might have been able to get in the lower pay ranges had he made the necessary applications. It is worthy of note that plaintiff testified that he systematically read the newspaper ads carried in local newspapers of general circulation.

Additionally, the Court carefully observed plaintiff's demeanor, method of testifying, and

courtroom conduct during the course of the trial, all of which tend to reinforce the conclusions reached as set forth in this Memorandum of Decision.

It is therefore the opinion of the Court that plaintiff is entitled to recover nominal damages only and that such nominal damages such not exceed the sum of ONE DOLLAR ($1.00), c.f. Carey, supra.

The matter of attorney's fees still remains before the Court. The Court is satisfied that plaintiff's counsel is able and skilled in the field encompassed in this lawsuit and that he diligently represented his client's interest. On the basis of the declaration filed herein setting forth counsel's background and experience, the Court is satisfied that he is entitled to be compensated at the rate of ONE HUNDRED DOLLARS ($100.00) per hour. The only question remaining is whether any division should be made in hours primarily devoted to preparation for trial on issues upon which plaintiff did not prevail or whether the issues

are so interrelated that the work accomplished by counsel was equally applicable to all issues before the Court including the issue upon which plaintiff has prevailed as matter of liability.

THE COURT THEREFORE ORDERS a further hearing upon the matter of attorney's fees to be conducted on August 22, 1983, at the United States Courthouse in San Jose, at 2:00 p.m. of that date.

DATED: 7/28/83

WILLIAM A. INGRAM
United States District Judge

FOOTNOTES

1. County of Monroe v. U.S. Department of Labor, 690 F.2d 1359 (11th Cir. 1982); Laje v. A.E. Thomason General Hospital, 665 F.2d 724, (5th Cir. 1982); Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Burt v. Abel, 585 F.2d 613 (4th Cir. 1978).

2. The parties orally stipulated in open court that all testimony and exhibits from the first trial be admitted in the second trial.

3. Answers to interrogatory No. 5, Nos. 1, 2, 3, 6, 7, 8, 9, 12, 19, 20. Supplemental answers to interrogatories Nos. 1, 2, 3, 4, 5, 8, 9, 10, 11, 14, 17, 18, 20, 21, 23, 33.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER, Plaintiff,	No. C-80-4369 WAI <u>DECISION</u>
-v-	
CITY OF MENLO PARK, and MIKE BEDWELL, City Manager of CITY OF MENLO PARK, Defendants.	

Each of the requests to modify Findings is DENIED.

Plaintiff's counsel is awarded attorney's fees in the sum of $21,508 and costs in the sum of $744.18.

The case was tried twice. On the first trial plaintiff prevailed on one out of three claims, which claim did not require for its proof much of the evidence heard at trial in support of the other two claims. Accordingly, after considering the standards set forth in Kerr v. Screen Extra's Guild, 526 F.2d 67 (9th Cir. 1975), I have reduced the hours claimed by two-thirds. I have not applied a multiplier

because it does not appear to me that the claim upon which plaintiff prevailed was unusually factually or legally complicated, or that the contingency risks incurred by counsel justify the use of a multiplier.

On the second trial, only the claim on which plaintiff prevailed was tried, and although plaintiff did not receive other than a token award, he did prevail and I have allowed all the hours claimed at the rate of $100 per hour, a rate which I have previously found to be reasonable. See Memorandum of Decision, filed July 28, 1983.

DATED: March 20, 1984.

WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

-v-

CITY OF MENLO PARK; MIKE
BEDWELL, City Manager of
City of Menlo Park,

Defendants.

No. C-80-4369 WAI

JUDGMENT

This cause came regularly on for trial before the Court sitting without a jury, and the cause having been tried, argued, and submitted, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff ROBERT ALEXANDER have and recover of the defendant CITY OF MENLO PARK, upon his first cause of action only, the sum of $1.00 nominal damages. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's counsel herein is awarded attorney's fees in the sum of $21,508.00 and costs in the sum of $744.18.

DATED: 5-24-84.

Hon. William A. Ingram
U.S. District Judge

JORGENSON, COSGROVE & SIEGEL
1100 Alma Street
Menlo Park, CA 94025
Telephone: (415) 324-9300

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER, Plaintiff,	No. C-80-4369-WAI
vs.	ORDER FOR NEW TRIAL AND SETTING ASIDE JUDGMENT
CITY OF MENLO PARK, and MIKE BEDWELL, City Manager of CITY OF MENLO PARK, Defendants.	

Plaintiff's Motion for New Trial having come on regularly for hearing before the undersigned, Louis A. Highman having appeared on behalf of plaintiff and John R. Cosgrove on behalf of defendants and good cause apperaring therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The motion for new trial is granted on the issue of damages, including reinstatement, but not on any issue relating to liability.

2. The judgment in favor of plaintiff against defendant filed July 23, 1982 and entered on July 28, 1982 is set aside and vacated.

3. Plaintiff's motion for attorneys fees shall be considered following the new trial on the damage and reinstatement issues.

DATED: _________________, 1982.

WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,
Plaintiff,

-v-

CITY OF MENLO PARK,
and MIKE BEDWELL,
City Manager of
City of Menlo Park,

Defendants.
/

No. C-80-4369 WAI

DECISION

Plaintiff is entitled to judgment against the City of Menlo Park only in the sum of $11,114.03, together with interest at the rate of 7% per annum from and after the date of entry of judgment herein, together with reasonable attorneys' fees and costs of suit actually incurred.

Plaintiff asserts claims under Title VII (42 U.S.C. Sec. 2000e), and under 42 U.S.C. Sec. 1983.

Plaintiff has failed to establish by a preponderance of the evidence a right to recover under Title VII. Assuming that a prima facie case was made out under the necessary criteria,

as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), any inference of discrimination was dispelled and wholly rebutted by the heavy weight of the evidence, which shows defendant to have conducted personnel practices in a fashion wholly free of racial bias or discriminatory intent, as is conclusively illustrated by the employment history of Aaron Johnson, during his period of employment with defendant.

The evidence further emphasizes defendant's absence of bias or discriminatory intent by its showing with respect to defendant's treatment of plaintiff when his job of Youth Director was abolished by City Council action. A new and more highly paid position was created for plaintiff and offered to him. That degree of solicitude for plaintiff's welfare is not consistent with bias.

Furthermore, there is no evidence of retaliation. I find that plaintiff's failure of probation was justified by the evidence. Leydon testified that on at least a weekly basis she

orally requested lesson plans from plaintiff and never received any that were satisfactory. Plaintiff did not request any guidance with respect to lesson plans until June 7, 1979. Leydon testified that in the case of a supervisory employee, such as plaintiff, such guidance should not be necessary and was not requested until June 7. When plaintiff did request guidance, Leydon gave him a packet of sample lesson plans.

Leydon started mentioning lesson plan completion to plaintiff as early as April 30, 1978. Ex. N.

The significance of lesson plans is illustrated by Leydon's statements as contained in page 3 of Ex. 35, and by the job performance standards, Ex. 13, which were agreed to by Leydon and plaintiff, and which require the preparation of daily work sheets/lesson plans outlining at least five activities for each day of the summer program. According to Ex. B, the lesson plans were to be prepared by May 1.

I conclude that plaintiff's failure of

probation was not the result of retaliatory discrimination, but of plaintiff's failure, after repeated notice, to perform a significant part of his job.

Plaintiff is, however, entitled to relief under the provisions of 42 U.S.C. Sec. 1983. Specifically, plaintiff was denied procedural due process of law as guaranteed him under the United States Constitution because the defendant failed to accord him all that was due him in these circumstances by the Personnel Rules duly adopted by defendant as Resolution No. 3064, on June 14, 1978, Ex. 4.

Rule V, Section 4 of Ex. 4, provides that if a probationary employee is deemed unstatisfactory for the probationary position such employee shall "return to prior classification and non-probationary status in that classification to the pay step he/she would have had if not promoted." The abolition of plaintiff's prior position in classification 39.5 is not contested.

I find that under the Personnel Rules, Ex.

4, the term "classification" does not mean "position". To hold that Rule V, Section 4 means that a failed promotional probationary employee is entitled to a return only to the position formerly held, as distinguished from the classification formerly held, is inconsistent with the plain meaning of the words used in Rule 1 of Ex. 4.

Therefore, plaintiff had a right to be returned to classification 39.5, and if there was no available job for which plaintiff was qualified within that classification he should have been accorded the benefits of Rule X, as a permanent employee.

Plaintiff was entitled to bumping rights; X Subd. 3D.

Rule X Subd. 3D provides that bumping rights can be exercised if the employee displacing another employee is in the opinion of the department head qualified to perform the job in which displacement occurs.

I am satisfied from the testimony of Leydon and Bedwell that neither would have approved

plaintiff's displacement of Aaron Johnson or of any employee outside of the Community Resources Department. Bedwell testified that plaintiff was qualified to displace occupants of such jobs as gym director and night clerk. While the acceptance of such a position seems inconsistent with plaintiff's employment orientation as revealed from the record as a whole, plaintiff had a right to exercise his X Subd. 3D rights with respect to those positions. On May 5, 1982, plaintiff testified that he "might have been interested" in the gym director and night clerk jobs. Whether plaintiff would have taken the jobs or not, the right to bump into them should have been available to plaintiff, even though it was felt that the proffer of such work would insult and demean plaintiff.

The contention of defendant in this case on the issue now under discussion is that plaintiff received notice of layoff in a timely fashion on January 24, 1979, and subsequently elected employment with the city in the new capacity of Recreation Supervisor II, as a probationary

employee. The City now contends that plaintiff failed probation and cannot now claim layoff rights by virtue of termination of that employment, because he was already in layoff status from his permanent employment, that of a class 39.5 employee, and in consequence had no permanent classification to which to return.

There is no question but what the layoff provisions of the Personnel Rules are invoked by the letter marked Ex. 14. All of the incidents of layoff are set forth in paragraph 4 <u>as an alternative</u> to plaintiff's acceptance of the offered promotional opportunity.

Plaintiff could not have been both laid off and promoted into a new probationary job status. Since he chose the latter course, I find that he impliedly rejected the alternative layoff status, and that upon the subsequent failure on probation was entitled to return to his permanent classification pursuant to Rule V, Sec. 4, and if there was no available job in that classification to exercise the rights specified for permanent employees by the

provisions of Rule X, Subd. 3D. Assuming that the language in that section stating "designated for layoff" modifies "permanent employees," such a designation clearly applies to a permanent employee whose permanent job has been abolished.

Because it did not reclassify plaintiff to pay grade 39.5 and accord him whatever opportunities were available to him under that classification, defendant violated its own rules to plaintiff's injury. Burnaman v. Bay City Independent School District, 445 F.Supp. 927 (S.D. Tex. 1978).

I have computed plaintiff's damages relying upon the figures set forth in Ex. 46, covering July 1979 - June 1980, and the accompanying computer printout covering July through December 1981, as follows:

Pay grade 27 (gym director)
August 1979 - June 1980 = $ 9,600.00

Pay grade 27
July 1980 - May 1982 = 20,740.06

TOTAL $30,340.06

The evidence with respect to attempts on the part of plaintiff to mitigate his damages is

slight. Plaintiff testified that since he left the defendant's employ he has continued job counselling services in his home community, apparently gratuitously. He reports no earnings whatever from August 9, 1979, through the time of trial. Plaintiff testified that he applied primarily for jobs in the $1,500 - $1,600 per month range. He said that the lowest salaried job he applied for was at the College of San Mateo, an entry level job. There is no testimony that he even sought work in the pay range of the gym director or night clerk jobs. He failed of appearance for a job interview arranged at the suggestion of defendant for the night clerk position, a job for which he was admittedly qualified.

Because his efforts in mitigation of damages appear to be less than vigorous his damages will be reduced by a sum equal to one-half the sum previously computed, cf. Atcherson v. Siebenmann, 458 F.Supp. 526 (S.D. Iowa 1970), leaving a base figure of $15,170.03. From this sum must be subtracted the sum of $4,056.00,

representing the sum paid to plaintiff as unemployment insurance, for a net damage figure of $11,114.03.

Plaintiff is not entitled to judgment upon his second or third causes of action.

The foregoing shall constitute Findings of Fact and Conclusions of Law. Fed. R. Civ. P. 52.

The issue of attorney's fees is bifurcated for further hearing on the issue of reasonableness.

Let judgment be entered accordingly.

DATED: July 23, 1982

WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK, and
MIKE BEDWELL, City Manager of
City of Menlo Park,

Defendants.

NO. C-80-4369-WAI

JUDGMENT

This cause came regularly on for trial before the Court, sitting without a jury, and the cause having been fully and fairly tried, argued and submitted, and good cause appearing therefore,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff ROBERT ALEXANDER have and recover of the defendant CITY OF MENLO PARK, upon his first cause of action only, the sum of $11,114.03, together with interest thereon at the rate of 7% per annum from and after the entry of this judgment, together with costs of suit actually incurred.

DATED: July 23, 1982

ENTERED IN CIVIL DOCKET July 28, 1982

WILLIAM A. INGRAM
United States District Judge

SUBCHAPTER VIII—COMMUNITY RELATIONS SERVICE—Continued

SUBCHAPTER IX—MISCELLANEOUS PROVISIONS

SUBCHAPTER I—GENERALLY

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

Historical Note

Codification. R.S. § 1977 is from Act May 31, 1870, c. 114, § 16, 16 Stat. 144.

Section was formerly classified to section 41 of Title 8, Aliens and Nationality.

Short Title of 1976 Amendment. Pub.L. 94–559, § 1, Oct. 19, 1976, 90 Stat. 2641, provided: "That this Act [amending section 1988 of this title] may be cited as 'The Civil Rights Attorney's Fees Awards Act of 1976'."

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Historical Note

Codification. R.S. § 1979 is from Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

1979 Amendment. Pub.L. 96–170 added "or the District of Columbia" following "Territory," and provisions relating to Acts of Congress applicable solely to the District of Columbia.

Effective Date of 1979 Amendment. Amendment by Pub.L. 96–170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub.L. 96–170, set out as an Effective Date of 1979 Amendment note under section 1343 of Title 28, Judiciary and Judicial Procedure.

Legislative History. For legislative history and purpose of Pub.L. 96–170, see 1979 U.S.Code Cong. and Adm.News, p. 2609.

Cross References

Citizenship clause, see U.S.C.A.Const. Amend. 14, § 1.
Conspiracy to interfere with civil rights, damages for, see section 1985 of this title.
Jurisdiction of district courts of civil rights actions, see section 1343 of Title 28, Judiciary and Judicial Procedure.
Privileges and immunities clauses, see U.S.C.A.Const. Art. 4, § 2, cl. 1 and Amend. 14, § 1.

Federal Rules of Civil Procedure

One form of action, see rule 2, Title 28, Judiciary and Judicial Procedure.
Rules as governing procedure in all suits of civil nature whether cognizable as cases at law or in equity or admiralty, see rule 1.

Library References

Civil Rights ⟾12.5(1).	C.J.S. Civil Rights §§ 114, 115, 119, 124.

West's Federal Forms

Allegations of jurisdiction, see §§ 1007, 1060.
Complaint, see §§ 1849, 1850, 1850.10, 1851, 1851.5, 1852.5 to 1852.13.
Declaratory judgments, see § 4781 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.
Three-judge courts, matters pertaining to, see § 6051 et seq.

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) **Employers.** It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) **Employment agency.** It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) **Labor organization.** It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Religion, sex, or national origin as bona fide occupational qualification; educational institutions with employees of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organization. As used in this title [42 USCS §§ 2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon

which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) **Seniority or merit system; ability tests.** Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)) [29 USCS § 206(d)].

(i) **Preferential treatment to Indians living on or near reservation.** Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) **Preferential treatment not required on account of numerical or percentage imbalance.** Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program,

in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(July 2, 1964, P. L. 88-352, Title VII, § 703, 78 Stat. 255; Mar. 24, 1972, P. L. 92-261, § 8(a), (b), 86 Stat. 109.)

§ 2000e-3. Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e–2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e–2000e-17].

(b) Notice or advertisement relating to employment based upon race, color, religion, sex, or national origin; religion, sex, or national origin as bona fide occupational qualification. It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

(July 2, 1964, P. L. 88-352, Title VII, § 704, 78 Stat. 257; Mar. 24, 1972, P. L. 92-261, § 8(c), 86 Stat 109.)

§ 2000e-5. Prevention of unlawful employment practices

(a) Power of Commission. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-2, 2000e-3].

(b) Charges; notification; investigation and determination. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in

such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) Time for action under State or local law. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to

such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved. (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party,

the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28 USCS §§ 1404, 1406], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case. the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

(h) Certain provisions inapplicable to actions against unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101–115) [29 USCS §§ 101 et seq.], shall not apply with respect to civil actions brought under this section.

(i) Proceedings to compel compliance with orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) **Appeals.** Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code [28 USCS §§ 1291, 1292].

(k) **Attorney's fee.** In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(July 2, 1964, P. L. 88-352, Title VII, § 706, 78 Stat. 259; Mar. 24, 1972, P. L. 92-261, § 4, 86 Stat. 104.)

RULE I

CLASSIFICATION AND PAY

Section 1. Preparation of Classification Plan: The Personnel Officer shall ascertain the duties and responsibilities of all positions in the competitive service and after consultation with the department heads affected, shall recommend a classification plan for such positions. The classification plan shall consist of classes of positions in the competitive service defined by class specification, including title, a description of typical duties and responsibilities of positions in each class, a statement of training, experience and other qualifications to be required of applicants for positions in each class. The classification plan shall be so developed and maintained that all positions substantially similar with respect to duties, responsibilities, authority, and character of work are included within the same class, and that the same schedule of compensation may be made to apply with equity under like working conditions to all positions in the same class.

Section 2. Adoption of Classification Plan: Before the classification plan or any part thereof shall become effective, it shall first be approved in whole or in part by the City Council, which shall arrange for the holding of one or more public hearings thereon. Notices of hearings shall be posted in the manner prescribed by the City Council, and the Council may, upon the conclusion of said hearing, make such changes or modifications of the plan as it shall deem warranted. Upon adoption by the Council, by resolution, the provisions of the classification plan shall be observed in the handling of all personnel actions and activities. The classification plan shall be amended or revised as occasion requires in the same manner as originally established.

Section 3. New Positions: New positions may be created by the Personnel Officer subject to the approval of the City Council at the time of the Compensation Plan Hearings. Descriptions of duties, minimum requirements, etc., shall be established for each new position in accord with Section 1 of this Article.

Section 4. Reclassification: Positions, the duties of which have changed materially so as to necessitate reclassification, shall be allocated to a more appropriate class, whether new or already created, in the same manner as originally classified and allocated. Reclassifications shall not be used for the purpose of avoiding restrictions surrounding demotions.

Section 5. Preparation of Compensation Plan: The Personnel Officer shall prepare a pay plan for each class of position in the competitive service, showing pay steps from the minimum to maximum rates. In arriving at such salary ranges, consideration shall be given to prevailing rate of pay for comparable work in other employment - public and private. Consideration should include working conditions as well as pay, current costs of living, suggestions from department heads, and the City's financial standing.

Section 6. Adoption of Compensation Plan: The Personnel Officer shall transmit the proposed pay plan to the City Council, who shall choose whether or not to adopt it in whole or in part in a manner similar to the adoption of the Classification Plan as outlined in Section 2 of this Article.

Section 7. Application of Rates: Employees occupying a position in the competitive service shall be paid a salary or wage within the range established for that position's class under the pay plan as provided. The minimum rate for the class shall normally apply; however, the Personnel Officer may hire those beginning employees who are especially qualified by their training or by their previous experience at any step in the range. Officers and employees re-employed in the same position or class after layoff shall receive a rate within the range established for the class and agreed upon by the appointing power and the employee concerned. A classification and pay study shall be done after layoffs to determine compensation for additional workload.

Section 8. Salary Increases: Salary increases shall not be automatic, but shall depend upon increased service value of an employee to the City, as exemplified by recommendations of his supervising official, performance record, special training undertaken, or other pertinent evidence. An employee is not eligible for an increase during the first six months of employment. The following step and time requirements shall normally apply before an employee gains eligibility for advancement in pay.

Step	Time in step before eligible for next step increase
A	6 months
B	12 months
C	12 months
D	12 months
E	Top Step

RULE II

APPLICATIONS AND APPLICANTS

Section 1. Announcements: Information about openings for positions in the competitive service shall be posted in the City Hall and in such other places as the Personnel Officer deems advisable, and published in at least one newspaper of general circulation in the City, one of general circulation in the labor market serving Menlo Park, and one which reaches minorities and in a manner so as to comply with the Affirmative Action Plan. The announcements shall specify the title and pay range of the class of the position announced; the nature of the work to be performed; minimum qualifications and requirements for the position; the date, time, place and manner of making applications and taking examinations; closing date for receiving applications; Equal Opportunity/Affirmative Action Employer; and other pertinent information.

Section 2. Application Forms: Applications shall be made on forms provided by the Personnel Officer. Such forms may require information covering training, experience, references, and any other pertinent information not prohibited by law. All applications must be signed by the person applying.

A statement certifying to the truthfulness of all information submitted by the applicant shall be contained on every application form.

Section 3. Disqualification: The Personnel Officer may reject any applicant before, during, or after examination and prior to an appointment for any of the following reasons:

a) Indication on the face of the application that the applicant does not possess the minimum qualifications required for the position.

b) Conviction of a felony that is related to the job to be performed.

c) Applicant lacks physical or mental abilities deemed appropriate for the position.

d) Personal habits or conduct currently engaged in which would interfere with the ability to perform work (e.g., use of narcotics or intoxicating liquors).

e) False statement of material fact or actual or attempted deception, fraud or misconduct in connection with an application or examination.

f) Failure to file the application with the Personnel Department prior to the application deadline.

Whenever an application is rejected, notice of such rejection with statement of reason shall be mailed to the applicant by the Personnel Officer. Defective applications may be returned to the applicant with notice to amend the same.

RULE III

TESTS

Section 1. Subjects and Method of Tests: Tests may be assembled, unassembled, written, oral, practical demonstration, or any combination thereof, or any other form which will test fairly the qualifications of applicants, and may consist of one or more of the following parts:

a) Special Subject: A test of aptitude for the position may be required.

b) Educational: Basic training as foundation for holding the position consisting of penmanship, spelling, composition, civics, city information, or any or all of these, as well as other subjects to test the basic training which would logically form the groundwork for performing the duties of the position and advancement in service.

c) Training and Experience: Training shall consist of a statement of schooling and studies. Experience shall consist of a statement of any past activities that would tend to fit candidates for the positions they seek.

d) Physical or Medical: A medical examination is required of all prospective full time employees, which may include review of all previous medical records, at the option of the examiner. Psychological screening may be required at the discretion of the Personnel Officer or Department Head.

e) Background Checks: Thorough background investigations are required for all positions in the Police Department and may be conducted for other City positions.

Section 2. Conduct of Test: The Personnel Officer, after consulting with department head, shall recommend to the Personnel Board the manner, method, and by whom tests shall be given. The Personnel Officer may contract with any competent agency or individual for the performance by such agency or individual of giving and scoring tests. The Personnel Officer shall arrange for the use of facilities and equipment for the conduct of tests and shall render such assistance as shall be required with respect thereto.

Section 3. Qualifying Grade and Rating Tests: In all tests the minimum grade or standing for which eligibility may be earned shall be based upon all factors in the test. Failure of one part of the test may be grounds for declaring such applicants as failing in the entire test.

Section 4. Notification of Results: Each applicant taking the test shall be given written notice of the results thereof and of the earned rating and, if successful, of the relative position on the employment list. Any applicant shall have the right to inspect his/her own test papers (except where prohibited by the agency contracted to provide the test). An error in grading or rating, if called to the attention of the Personnel Officer within one month after posting the employment lists resulting from the examination shall be corrected by an appropriate adjustment of eligibility list. Correction shall not, however, invalidate an appointment previously made.

Section 5. Promotional Tests: As the needs of the service may require, promotional tests may be conducted from time to time and may consist of evaluation of prior service, accomplishments in special training courses, and other tests. All candidates for promotion must possess the minimum qualifications as set forth in the specifications of the class to which promotion is sought.

Section 6. Age: Age shall not be a qualification for any city employment in the classified service, with the exception that applicants for positions as police officers must be between the ages of 18 and 35. For lateral entry in the police department, persons between age 35 and 40 are acceptable if the experience qualification is met.

RULE IV

ELIGIBLE LISTS AND METHODS OF FILLING VACANCIES

Section 1. Eligible Lists: As soon as possible after the assessment of the candidates' qualifications, the Personnel Officer shall prepare and keep on file an eligible list consisting of the names of persons successfully passing the performance, written and/or oral examination and arrange in order of final standing relative to other applicants.

Section 2. Duration of Eligible List: Eligible lists shall become effective upon the approval thereof by the Personnel Board or upon its certification by the Personnel Officer that the list was legally prepared and represents the qualified list. Employment and promotional lists shall remain in effect six months and may be extended by action of the Personnel Officer for an additional six-month period. In no event shall an employment or promotional list remain in effect for more than two years.

Section 3. Abolition of Position: Names appearing on eligible lists by reason of abolishment of a position shall remain thereon for two years, and procedure shall be in accordance with seniority policies.

Section 4. Removal of Names From Lists: The names of any persons appearing on an eligible list shall be removed by the Personnel Officer if the eligible person requests in writing that their name be removed; if he/she fails to respond to a notice of certification mailed to their last known address; or if he/she has been certified for appointment three times and has not been appointed. The person affected shall be notified of the removal of his name by a notice mailed to his last known address. The names of persons on promotional eligible lists who resign from the service shall automatically be dropped from such lists.

Section 5. Methods of Filling Vacancies: All vacancies in the competitive service may be filled by re-employment, transfer, demotion, promotion or from persons certified by the Personnel Board or Personnel Officer from appropriate eligible lists if available. In the absence of persons eligible for appointment in these ways, temporary appointments may be permitted.

Section 6. Certification of Eligibles: The Personnel Officer shall indicate whether it is desired to fill the vacancy by re-employment, transfer, or demotion, or whether certification from a promotional or employment list is preferred. If appointment is to be made from an employment or promotional list, the names of all persons willing to accept appointment shall be certified by the Personnel Board or the Personnel Officer in the order in which they appear on the list.

Section 7. Appointment: After interview and investigation, the appointing power shall make appointments from among those certified. The Personnel Officer shall thereupon notify the person appointed, and if the applicant accepts the appointment and presents himself for duty at such time and place as the appointing authority shall prescribe, he shall be deemed to be appointed; otherwise, he shall be deemed to have declined the appointment.

Section 8. Emergency Appointments: To meet the immediate requirements of an emergency condition such as fire, flood or earthquake, which threatens life or public property, any legally competent officer or employee may employ such persons as may be needed for the duration of the emergency without regard to the Personnel Ordinance or rules affecting appointments. As soon as possible such appointment shall be reported to the Personnel Officer.

RULE V

PROBATION

Section 1. Definition: The probationary period shall be regarded as a part of the testing process and shall be utilized for closely observing the employee's work, for securing the most effective adjustment of a new employee to a prospective position and for rejecting any probationary employee whose performance is not satisfactory.

Section 2. Probationary Period: All original and promotional appointments shall be tentative and subject to a probationary period of six (6) months for miscellaneous employees and twelve (12) months for Police Officers. At least one (1) month prior to permanent appointment, the Personnel Officer may extend the probationary period not to exceed six (6) months if good cause exists therefore. "Good cause" as used herein is defined to include, but not be limited to, failure to satisfactorily perform necessary job functions or inability to observe the employee during the probationary period due to the employee's illness or disability or the employee's absence for any reason.

Section 3. Satisfactory Completion: Upon satisfactory completion of the probationary period, the Personnel Officer shall file with the employee a statement in writing to such effect and stating that appointment to the permanent position is thereby completed.

Section 4. Unsatisfactory Probation: If the service of a probationary employee is not satisfactory, the probationary employee will be notified in writing that he/she has been rejected for the permanent position. Said notice shall contain the reasons for rejection. The rejected probationary employee may review said reasons and any supporting documentation with the Personnel Officer, but shall not be entitled to pursue the grievance procedure or otherwise be entitled to a hearing.

An employee deemed unsatisfactory for a position shall return to prior classification and non-probationary status in that classification to the pay step he/she would have had if not promoted.

RULE VI

ATTENDANCE AND LEAVES

Section 1. Vacations: Vacation leave with pay shall be granted each permanent employee in the competitive service in accordance with the vacation accrual schedule on file in the Personnel Department.

Vacations cannot be taken during the first six (6) months of employment; however, probationary time counts for vacation accrual. Vacation time may be accumulated up to thirty (30) working days or with the approval of the supervisor and the consent of the City Manager, a maximum of forty (40) working days. Vacation schedules will be determined by the supervisor after considering the needs of the service and the employee's desires. Accrued vacation time will be paid to employees permanently separated from the service or, at the request of the employee, when granted a leave of absence. After reaching maximum accrual (40 days) an employee must take time off or accrual will be frozen.

Section 2. Sick Leave: The "Income Protection Plan" allows 100% of an employees salary for the first thirty (30) calendar days of absences from work because of illness or injury. Should the illness or injury extend beyond 30 days, the City will insure continued payment to the employee at 66 2/3% of salary, up to a maximum as provided in the long term disability policy. The amounts paid would be less any payments received from either Workers' Compensation or retirement. The City may seek a long term disability insurance policy with a private insurance carrier of its choosing to meet any or all of the City's responsibilities as set forth in this paragraph. During the first year of disability and as long as no retirement determination has been made by the City, the employee will be entitled to continued City paid health insurance, AD&D, dental plan and life insurance benefits, and to the accrual of vacation time. At the end of 365 calendar days from the date of illness or injury and unless previously retired, should the employee not be able to return to work, the employee would officially cease being an employee and not receive further entitlements beyond the 66 2/3% of salary as provided for in the long term disability provision of this paragraph.

The City shall have the right and obligation to monitor the operation of the Income Protection Plan and take appropriate actions to insure that benefits are paid out only for actual illness and/or injury conditions. The City shall have the right to require medical proof of illness and/or disability and to take appropriate disciplinary action in those cases where abuse has occurred.

Section 3. Military Leave: Military leave shall be granted in accordance with the provisions of state law. All employees entitled to military leave shall give the appointing power an opportunity within the limits of military regulations to determine when such leave shall be taken.

Section 4. Leave of Absence: Employees desiring to take leave of absence must submit a written request to the Department Head, and Personnel Officer. The Personnel Officer may grant a permanent employee leave of absence without pay for a period not to exceed one (1) year, during which time no benefits will accrue. Approval shall be in writing and a copy filed with the Personnel Department. Upon expiration of a regularly approved leave, or within five (5) working days after notice to return to duty, the employee shall be reinstated in the position held at the time the leave was granted. Failure on the part of an employee on leave to report promptly at its expiration, or within three (3) working days after notice to report to duty may be deemed notice of resignation and/or cause for disciplinary action.

Section 5. Bereavement Leave: Leave with pay to a maximum of three (3) days will be granted to employees with six (6) months or more service when a death has occurred in the immediate family. Immediate family includes parents, spouse, brothers, sisters, dependents, and spouses parents. Exceptions will be considered by the Personnel Officer.

Section 6. Hours of Work: All offices of the City, except those for which special regulations are required, shall be kept open on all days of the year except Saturdays, Sundays, and holidays, during the hours established by the Personnel Officer. Employees for whom necessity requires a different schedule than that generally applied shall work according to regulations prepared by the respective supervising official and approved by the Personnel Officer.

The normal employee contract (for persons other than management employees) requires that no more than a specified number of hours need be worked per week. Occasionally, however, a department head may decide that an employee's services are needed beyond normal working hours in order to maintain the public health, safety, general welfare, and/or the efficient operations of the department. Under these conditions, and at his/her discretion, the department head may ask for volunteers or require overtime service from an employee, which shall be recorded in accordance with Overtime Policy & Procedures. Department heads shall distribute overtime work among employees in an equitable manner where comparable job classifications and work assignments permit. If this earned time is taken as compensatory time off, it may be given only when the services of the individual involved are not needed for the efficient functioning of the department and in any event shall be given only when approved by the department head. Compensatory time may not be accumulated beyond 40 hours.

In lieu of compensatory time off or overtime, each management employee may receive up to 40 hours per year of paid administrative leave to be taken at the discretion of the department head who shall consider the recent work schedule of the employee, the needs of the department and the City, and such other matters as he/she deems material. Administrative leave for department heads will be taken with prior approval of the City Manager.

Section 7. Attendance: Employees shall be in attendance at their work in accordance with the rules regarding hours of work, holidays, and leaves. All departments shall keep daily attendance records of employees which shall be reported to the Personnel Officer in the form and on the dates he/she shall specify. Failure on the part of an employee, absent without permission, to report to work or communicate satisfactory reasons for not reporting to work for a period of three (3) days may be deemed notice of resignation and/or cause for disciplinary action.

Section 8. Holidays: Municipal offices shall be closed on the following legal holidays: New Year's Day; Lincoln's Birthday; Washington's Birthday; Memorial Day; Independence Day; Labor Day; Admission Day; Veterans' Day; Thanksgiving Day and the following day; Christmas Day. When a holiday falls on a Sunday, the following Monday will be observed. When a holiday falls on a Saturday, the preceding Friday will be observed.

RULE VII

TRAINING OF EMPLOYEES

Section 1. Responsibility for Training: Responsibility for developing training programs for employees shall be assumed jointly by the City Council, the Personnel Officer, and department heads. An Employee Development Committee may be formed to assist in this responsibility. Such training programs may include lecture courses, demonstrations, assignment of reading matter, or such other devices as may be available for the purpose of improving the efficiency and broadening the knowledge of municipal officers and employees in the performance of their respective duties. Training will be provided in compliance with the City's Affirmative Action Plan and Employee Development Policy in existence at that time.

Section 2. Credit for Training: Participation in and successful completion of special training courses may be considered in making advancements and promotions. To encourage such additional education or job training, expenses and/or tuition may be paid by the City, when approved in advance.

RULE VIII

REPORTS AND RECORDS

Section 1. Records: The Personnel Officer shall maintain Personnel records for each employee in the service of the City showing the name, title of position held, the department to which assigned, salary, changes in employment status, attendance records and other such information as may be considered pertinent.

Personnel files of individual employees are confidential information and shall be used or exhibited only for administrative purposes or in connection with official proceedings before the City Council. However, any employee may examine his/her own file at any reasonable time with the exception of information obtained confidentially in response to reference inquiries.

No information of any kind shall be placed in the individual employee personnel file without simultaneous notification of its complete content to the employee concerned.

Section 2. Change of Status Report: Every appointment, transfer, promotion, demotion, change of salary rate, and any other temporary or permanent change in status of employees shall be reported in writing to the Personnel Officer in such manner as may be prescribed by him/her.

Section 3. Performance Appraisals: Performance appraisals shall be done at least twice during the probation period, and at least annually thereafter. Performance appraisal shall be done by employee's supervisor or department head in consultation with the employee, but not in conjunction with merit increase evaluations.

Section 4. Destruction of Records: All personnel records of City employees shall be kept indefinitely. All other records may be destroyed in accordance with the City's Records Management Ordinance.

RULE IX

CHANGES IN EMPLOYMENT STATUS

<u>Section 1</u>. <u>Transfer</u>: After notice to the Personnel Officer, an employee may be transferred by the appointing power at any time from one position to another position in the same or comparable class. If the transfer involves a change from the jurisdiction of one supervising official to another, both must consent thereto unless the City Council orders the transfer for purposes of economy or efficiency. Transfer shall not be used to effect a promotion, demotion, advancement, or reduction; each of which may be accomplished only as provided in the Personnel Ordinance and in these rules. No person shall be transferred to a position for which he/she does not possess the minimum qualifications.

<u>Section 2</u>. <u>Promotion</u>: Insofar as it is consistent with the best interest of the service, all vacancies in the competitive service shall be filled by promotion from within the competitive service, after a promotional test has been given and a promotional list established. It shall be incumbent on the Personnel Officer, however, to evaluate the position and the prospective merit system candidates to see if the competitive service will be strengthened by a closed promotional examination, and the Affirmative Action Plan complied with.

If in the opinion of the Personnel Officer, a vacancy could be filled better by an open competitive test instead of a closed promotional test, then the Personnel Officer may call for applications for the vacancy and arrange for an open competitive test and for the preparation and certification of an eligible list.

<u>Section 3</u>. <u>Demotion</u>: A department head may designate for demotion an employee whose ability to perform his required duties falls below standards required by the department head or who has committed a breach of discipline.

Any employee who has been designated for demotion shall be entitled to receive a written statement of the reasons, and a hearing as provided in Rule XI of these rules.

Upon request of the employee, and with consent of the prospective supervising official, demotion may be made to a vacant position as a substitution for layoff. No employee shall be deomoted to a position for which he/she does not possess the minimum qualifications.

RULE X

SEPARATION FROM THE SERVICE

Section 1. Temporary Suspension: Department heads may suspend employees up to three (3) days without pay for disciplinary reasons. Continuation beyond three (3) days can be authorized only by the Personnel Officer.

Section 2. Discharge: The department head may designate for discharge any employee at any time for the following reasons:

a) Employee's failure or inability to perform duties required by management for the particular position or to conform to required policies of the City.

b) Employee's breach of discipline or violation of legal obligations.

c) Fraud - false statement of material fact or actural or attempted deception.

Whenever it is the intention of the department head to discharge any employee, the Personnel Officer may first enter an order for suspension without pay. Any employee who has been designated for discharge shall receive a written statement of the reasons for such actions and a hearing as provided for in Rule XI . The period of suspension shall extend until the time a decision is made by the Personnel Officer as provided for in Rule XI . The Personnel Officer may, if appropriate, direct suspension for a period up to six (6) months in lieu of discharge.

Section 3. Layoffs: (A) City Council retains authority to abolish positions, organize and reorganize city departments and determine organizational needs. In the event that the City eliminates or reduces a particular classification within a city department and the layoff of any employee(s) will result therefrom, layoffs will be made in accordance with these rules, and in the following order:

1) Temporary: For the limited purposes of this section "Layoffs", temporary employees are defined as employees hired for a definite term;

2) Part-time: For the limited purposes of this section, part-time employees are defined as employees hired to work less than thirty (30) hours per week and, during their employment, have actually worked less than 2,080 total hours;

3) Police reserves and any other employees not otherwise described herein;

4) Probationary: For the limited purposes of this section "Layoffs", probationary employees are defined as employees who have not yet completed the probationary period, or any extension(s) thereof, as provided in these rules;

5) Permanent: For the limited purposes of this section, permanent employees are defined as employees hired to work thirty (30) hours per week or more or employees who, during their employment, have actually worked 2,080 or more total hours.

Layoffs in each of the foregoing subcategories will be exhausted within a department before layoffs will occur in the following subcategory in that department.

B) Except as provided for hereinafter, layoffs will be made in reverse order of seniority. Those employees with the least time served in a classification shall be laid off first, with ensuing layoffs occurring in reverse order of length of service in classification.

1) If two employees have served the same time in classification, then, as between those two employees, the layoff will be based on total time of service with the City. If total time of service with the City is the same, then, as between those two employees, the layoff will be based on performance ratings, and the needs of the department, as determined by the City.

2) Length of service shall be determined by computing total continuous service starting from the first day of service in a classification or, if necessary, the first day of service with the City. Up to three (3) months a year spent on involuntary military leave and job related educational leave shall be included. For employees working less than full time, hours shall be converted into days worked for purpose of determining length of service.

3) For any employee retreating within a department, seniority shall be computed as length of service in the classification to which the employee is retreating, plus any time served in any previously held higher classifications in that department; for any employee retreating from one department to another, seniority shall be computed as total length of service with the City.

C) Layoffs will not occur in reverse order of seniority in the following circumstances:

1) When the Department Head and City Mnaager determine that laying off an employee with special skills will impede or impair the operation of the department, then the Department Head and City Manager may designate the next most senior employee.

D) Permanent employees and employees on probation following promotion designated for layoff shall have the following options:

1) To displace a less senior employee in a position with the City which the more senior employee formerly held and which the more senior employee is qualified to occupy in the judgment of the department head;

2) To displace a less senior employee in the same department who occupies a position which the more senior employee is qualified to occupy in the judgment of the department head;

3) To take a voluntary demotion within the department to a position which the employee is qualified to occupy in the judgment of the department head, thereby displacing an employee in that position having less seniority.

E) A retreating employee has a right to be retained in the highest salary range possible which is equal to or less than his or her present salary range. An employee involved in layoff may not retreat to a step with higher salary. However, nothing in this section shall be construed as to prohibit an employee from applying for a position in a higher classification.

F) The names of all employees laid off shall be placed on a re-employment eligibility list for City wide positions, and such list shall have preference over any other employment list. This list shall remain in effect for two (2) years from date of layoff. Former employees with the most seniority will be entitled to preference in their former department or classification providing they meet the qualifications and performance standards. For position in other City departments, former employees will be considered first with due consideration for qualification and prior performance.

G) Permanent employees and employees on probation following promotion who are laid off shall be entitled to two (2) weeks severence pay plus having their names placed on the re-employment eligibility list.

H) Former employees appointed from a re-employment eligibility list shall be restored all rights accrued prior to being laid off, such as frozen sick leave, vacation accrual rate and credit for years of service, except for any benefits for which they received compensation at the time of or subsequent to the date of layoff; provided, severance pay shall not be repaid.

I) Employees designated for layoff shall be given at least fifteen (15) days advance written notice from the Personnel Officer.

<u>Section 4</u>. <u>Resignation</u>: An employee wishing to leave the competitive service in good standing shall file with the supervising official at least ten (10) working days before leaving the service, a written resignation stating the effective date and reasons for leaving. The resignation shall be forwarded to the Personnel Officer with a statement by the department head as to the resigned employee's service performance and other pertinent information concerning the cause for resignation. Upon receipt of resignation, the Personnel Officer shall schedule an exit interview with the employee. (Failure to give proper notice of resignation shall be entered on the service record of the employee and may be cause for denying future employment by the City.)

With the approval of the Personnel Officer, an employee who has resigned with a good record may be reinstated within two years to his former position, if vacant; or to a vacant position in the same comparable classification, if there is no existing re-employment eligibility list.

Failure to report to work or communicate satisfactory reasons for not reporting to work for a period of three (3) days may be deemed notice of resignation.

No employee may withdraw a resignation once submitted without the approval of the City Council. No employee may challenge the refusal to allow withdrawal of a resignation nor is any employee entitled to a hearing on account thereof. Any attempt to invalidate or nullify a resignation on any grounds must be filed in a court of competent jurisdiction within thirty (30) days of the original submission of said resignation.

RULE XI

APPEALS AND HEARINGS

Section 1. Notices: Prior to reprimand, suspension, demotion or discharge, any permanent employee in the competitive service who has been designated for reprimand, suspension, demotion or discharge shall be given a written statement of the reasons for such action. The employee may, within five (5) days after the receipt of the statement, file a written reply thereto. The written statement and any reply thereto shall be filed with the City Manager. The employee may waive the right to receive the written statement. Any such waiver shall be in writing. Thereafter the employee shall meet with the Personnel Officer; such meeting shall take place no sooner than five (5) days after the written statement (or waiver thereof) has been given; at least five (5) days written notice of such meeting shall be given to the employee. The decision of the Personnel Officer relative to reprimand, suspension, demotion or discharge shall be made only after such meeting.

Section 2. Method of Appeal: Any permanent employee in the competitive service who has been formally reprimanded, suspended, demoted or discharged shall be entitled to pursue the following

a) Within ten (10) days of the above described action, said employee shall initiate the appeal procedure by filing with the Personnel Officer a written statement, describing all facts deemed material thereto, including the grounds therefore;

b) Within five (5) days of filing said written appeal, the employee shall meet confidentially with his/her immeidate supervisor to attempt to adjust the matter;

c) Within five (5) days of being notified by the immediate supervisor of his/her disposition, if dissatisfied the employee shall meet confidentially with the department head;

d) Within five (5) days of being notified by the department head of his/her disposition of the matter, if dissatisfied, the employee shall meet confidentially with the Personnel Officer;

e) Within five (5) days of being notified by the Personnel Officer of his/her disposition of the matter, if dissatisfied, the employee shall file a written request with the Personnel Officer for a hearing and shall designate that said hearing shall be conducted by the Personnel Board of a hearing officer selected with the concurrence of the City and the employee;

f) Within ten (10) days of the decision by the Personnel Board of hearing officer, either the employee or the City may appeal in writing to the City Council. The City Council shall examine the record and may affirm, modify or reverse the decision or may remand the matter to the appropriate decision making body with instructions. There shall be no hearing before the City Council, or any evidence introduced before it.

g) The provisions of California Code of Civil Procedure Section 1094.6 shall apply to judicial review of all actions taken under these rules.

RULE XII

GENERAL PROVISIONS

Section 1. Departmental Rules: Department heads may make additional department guidelines to fit their own needs so long as they are in conformance with the Personnel Ordinance and these rules. Such departmental rules shall be subject to the approval of the Personnel Officer who may consult with the Personnel Board.

Section 2. Scope of Rules: The provisions of these rules shall be binding upon all full time employees in the competitive service.

Section 3. Grievance Procedures: Any employee having a complaint about working conditions shall be entitled to pursue the foregoing grievance procedure through Section 2 (d) but shall have no right to proceed with any subsequent step of the appeal procedure. The decision of the Personnel Officer shall be final and shall not be reviewable in court more than ninety (90) days from the date of such decision.

Section 4. NOTE: As used in Rule XI, the word "days" shall be construed to mean days that the City Hall of the City of Menlo Park is open for public business.

CERTIFICATE OF SERVICE

I declare that I am over the age of 18 years, a citizen of the United States. On September 22, 1986, I served the within APPENDIX TO PETITION FOR WRIT OF CERTIORARI on the defendants/respondents in said cause, by placing a true copy thereof, enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at San Francisco, CA, addressed as follows:

John R. Cosgrove, Esq.
JORGENSON, COSGROVE, SIEGEL & McCLURE
1100 Alma Street, Suite 210
Menlo Park, CA 94025

I declare under penalty of perjury that the foregoing is true and correct, and was executed on September 22, 1986, at San Francisco, California.

Robert Alexander